TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~942~~ 472

JOSEPH R. DUNLOP, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED MARCH 19, 1896.

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INDEX.

	Original.	Print.
Caption	1	1
Order to file indictment	1	1
Indictment	2	1
Order for bench warrant, &c.	24	15
Bench warrant	24	15
Marshal's return	25	15
Recognizance	26	16
Petition for a bill of particulars	28	17
Order taking petition under advisement	32	20
Order denying petition for bill of particulars, &c.	32	20
Order quashing counts of indictment not elected by prosecution	33	20
Arraignment and plea	33	21
Order beginning trial	33	21
Order to furnish meals to the jurors	34	21
Order continuing trial	34	21
Orders continuing trial	35	22
Order concluding trial	36	22
Verdict	36	22
Motion for new trial	36	23
Order overruling motion for new trial	49	32
Motion in arrest of judgment	49	32
Order overruling motion in arrest of judgment	50	32
Judgment and sentence	51	33

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	Original.	Print.
Order granting stay of execution, &c.	51	33
Recognizance	52	34
Bill of exceptions	54	35
Petition for bill of particulars, &c.	55	35
Evidence for the Government	61	38
Testimony of Robert McAfee	61	38
Government Exhibit 1—Cutting from "The Dispatch," December 3, 1894.	66	41
Cutting from "The Dispatch," July 6, 1895	67	42
July 27, 1895	68	43
August 10, 1895	69	44
September 14, 1895	70	45
October 19, 1895	71	46
Testimony of Robert W. McAfee (recalled)	77	49
Washington Hesing	85	53
John A. Montgomery	87	54
H. H. Kohlsaat	102	60
Thomas M. Beatty	102	60
Francis A. Morse	103	61
Government Exhibit 9—Memorandum of second-class mail, July 6, 1895	105	62
10—Memorandum of second-class mail, July 27, 1895	106	63
11—Memorandum of second-class mail, September 14, 1895	107	64
12—Memorandum of second-class mail, October 19, 1895	108	65
Testimony of J. J. Burke	109	65
Government Exhibit 13—Memorandum of second-class mail, August 10, 1895	110	66
Testimony of Walter C. Henry	111	66
Government Exhibit 14—Memorandum weight receipt, July 6, 1895	112	67
15—Memorandum weight receipt, September 14, 1895	113	68
16—Memorandum weight receipt, October 19, 1895	114	69
Testimony of T. Ohlander	115	69
Walter S. Mayer	116	70
W. R. Chamberlain	118	71
Objections to Government Exhibit 2	119	71
Government Exhibit 2—Cutting from "The Dispatch," July 6, 1895	121	72
Objections to Government Exhibit 3	123	72
Government Exhibit 3—Cutting from "The Dispatch," July 27, 1895	125	73
Objections to Government Exhibit 4	127	73
Government Exhibit 4—Cutting from "The Dispatch," August 10, 1895	129	74
Objections to Government Exhibit 5	131	74
Government Exhibit 5—Cutting from "The Dispatch," September 14, 1895	133	75
Objections to Government Exhibit 6	135	75

	Original.	Print.
Government Exhibit 6—Cutting from "The Dispatch," July 6, 1895	137	76
Objections to Government Exhibit 7	139	76
Government Exhibit 7—Cutting from "The Dispatch," September 14, 1895	141	77
Objections to Government Exhibit 8	143	77
Government Exhibit 8—Cutting from "The Dispatch," October 19, 1895	145	78
Government rests	147	78
Motion for verdict for defendant	147	78
Exceptions to address of United States attorney to the jury	148	78
Extract from closing argument of counsel for defendant	151	80
Charge of the court	152	80
Exceptions to the charge	168	87
Exceptions to refusal to charge	174	90
Judge's certificate to bill of exceptions	180	92
Assignment of errors	181	93
Gov. Exhibit 1—Cutting from "The Dispatch," Dec. 3, 1894	182	94
July 6, 1895	183	95
July 27, 1895	184	96
Aug. 10, 1895	185	97
Sept. 14, 1895	186	98
Oct. 19, 1895	187	99
Gov. Exhibit 9—Memorandum of second-class mail, July 6, 1895	194	103
10—Memorandum of second-class mail, July 27, 1895	195	104
11—Memorandum of second-class mail, September 14, 1895	196	105
12—Memorandum of second-class mail, October 19, 1895	197	106
13—Memorandum of second-class mail, August 10, 1895	198	107
14—Memorandum weight receipt, July 6, 1895	199	108
15—Memorandum weight receipt, Sept. 14, 1895	200	109
16—Memorandum weight receipt, Oct. 19, 1895	201	110
2—Cutting from "The Dispatch," July 6, 1895	204	111
3—Cutting from "The Dispatch," July 27, 1895	207	111
4—Cutting from "The Dispatch," Aug. 10, 1895	210	112
5—Cutting from "The Dispatch," Sept. 14, 1895	213	112
6—Cutting from "The Dispatch," July 6, 1895	216	113
7—Cutting from "The Dispatch," Sept. 14, 1895	219	114
8—Cutting from "The Dispatch," Oct. 19, 1895	222	114
Petition for writ of error	242	122
Order granting writ of error	243	123
Bond on writ of error	244	123
Clerk's certificate	245	124
Writ of error	246	124
Citation and acceptance of service of same	247	125
Order of Mr. Justice Brown that writ of error operate as supersedeas, and that defendant be admitted to bail	248	125

1 Pleas in the district court of the United States of America for the northern division of the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Honorable Peter S. Grosscup, district judge of the United States for said northern district of Illinois, on Tuesday, the fourth day of February, A. D. 1896, in the December term of said court, in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the one hundred and twentieth year.

T. C. MACMILLAN, *Clerk.*

THE UNITED STATES
vs.
JOSEPH R. DUNLOP. } 2574. Vio. § 3893 Postal Laws.

Be it remembered that on the twenty-fourth day of October, in the adjourned October term of said court, 1895, the following, among other, proceedings were had and entered of record before Hon. Romanzo Bunn, judge:

THE UNITED STATES
vs.
JOSEPH R. DUNLOP. } 2574. Vio. § 3893 Postal Laws.

Come the grand jury this day and return in open court an indictment against Joseph R. Dunlop, the defendant herein; whereupon, on motion of the district attorney, it is ordered by the court that said indictment be filed and the cause placed upon the dockets of this court.

2 NORTHERN DISTRICT OF ILLINOIS, } *ss:*
Northern Division,

Be it remembered that on the twenty-fourth day of October, 1895, the grand jury of the United States, empaneled and sworn in and for the adjourned October term of the district court of the United States for said northern division of the northern district of Illinois, came into open court at Chicago, in said district, and presented in open court an indictment, signed by their foreman, as a true bill against Joseph R. Dunlop, defendant; which said indictment is in the words and figures following, to wit:

NORTHERN DISTRICT OF ILLINOIS, } *sct:*
Northern Division,

In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the October Adjourned Term, in the Year of our Lord Eighteen Hundred and Ninety-five.

The grand jurors for the United States of America, inquiring for the northern division of the northern district of Illinois, upon their oath present that Joseph R. Dunlop, late of the city of Chicago, in

the said division and district, on the seventeenth day of June, in the year of our Lord eighteen hundred and ninety-five, at Chicago aforesaid, in the division and district aforesaid, unlawfully did
3 knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a certain printed newspaper then and there bearing the address of R. M. Williams, box 801, and containing (amongst other things) certain obscene, lewd, lascivious, and indecent matters in print—that is to say, a copy of a newspaper called "The Chicago Dispatch," issued and bearing date the seventeenth day of June, in the same year, eighteen hundred and ninety-five, and containing, on the seventh page thereof, certain obscene, lewd, lascivious, and indecent matters under the headings of "personal" and "baths," of too great length to be here set out entire; and so the grand jurors aforesaid upon their oath aforesaid do say that the said Joseph R. Dunlop, at the time and place in that behalf aforesaid, in manner and form aforesaid, unlawfully did knowingly deposit and cause to be deposited, for mailing and delivery, an obscene, lewd, and lascivious paper and print and publication of an indecent character, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the twenty-sixth day of July, in the year of our Lord eighteen hundred and ninety-five, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States at Chicago aforesaid, for mailing and delivery, a certain other copy of the said newspaper called "The Chicago Dispatch," directed to "Mr. Montgomery," issued on and bearing date of the day in this count aforesaid, and containing (amongst other things) on the sixth page thereof, under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length to be here set out entire and so indecent that the same would be offensive
4 to the court here and improper to be placed upon the records thereof, wherefore the grand jurors aforesaid do not set forth the same in this indictment; and so the grand jurors aforesaid upon their oath aforesaid do say that the said Joseph R. Dunlop, at the time and place in this count aforesaid, in manner and form aforesaid, unlawfully did knowingly deposit and cause to be deposited, for mailing and delivery, an obscene, lewd, and lascivious paper and print and publication of an indecent character, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the twenty-first day of June, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication en-

titled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 828 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

5 And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the twenty-ninth day of June, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 835 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the second day of July, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown,

6 and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 837 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length

and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the sixth day of July, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 840 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the eleven-
7 enth day of July, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 844 of the said paper, print, and publication, and contained (amongst other things), on the seventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the thirteenth day of July, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed

to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 846 of the said paper, print, and publication, and contained,
8 (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the nineteenth day of July, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 851 of the said paper, print, and publication, and contained (amongst other things), on the seventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the twentieth day of July, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit
9 and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 852 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full,

against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the twenty-fifth day of July, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 856 of the said paper, print, and publication, and contained (amongst other things), on the seventh page thereof and under the headings
10 of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the twenty-seventh day of July, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 858 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the first day of August, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States
11 there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies

was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five o'clock edition of the day in this count aforesaid and number 862 of the said paper, print, and publication, and contained (amongst other things), on the seventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the third day of August, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in t-is count aforesaid and number 864 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious,
12 and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the seventh day of August, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 867 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity

of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the tenth day of August, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled
13 "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "—. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 870 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the thirteenth day of August, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 872 of the said paper, print, and publication, and contained (amongst other things), on the seventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the
14 form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the seventeenth day of August, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled

"The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 876 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the nineteenth day of August, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and
15 the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 877 of the said paper, print, and publication, and contained (amongst other things), on the seventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the twenty-fourth day of August, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 882 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and

dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

16 And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the thirtieth day of August, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 887 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the thirty-first day of August, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there

17 a copy of the five-o'clock edition of the day in this count aforesaid and number 888 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the fifth day of September, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication en-

titled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 892 of the said paper, print, and publication, and contained (amongst other things), on the seventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the seventh day of September, in the year aforesaid, at Chicago aforesaid, in the
18 division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five o'clock edition of the day in this count aforesaid and number 894 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the eleventh day of August, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-oclock edition of the day in this count aforesaid and number 897 of the said paper, print, and publication, and con-
19 tained (amongst other things), on the seventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full,

against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the fourteenth day of September, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposted in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 900 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters, in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the seventeenth day of September, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 902 of the said paper, print, and publication, and contained (amongst other things), on the seventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the twenty-first day of September, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The

Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 906 of the said paper, print, and publication, and contained
21 (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the twenty-eighth day of September, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 912 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the fifth day of October, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and
22 cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 918 of the said paper, print, and publication, and contained (amongst other things), on the fifteenth page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of

too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the twelfth day of October, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 924 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd,
23 lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Joseph R. Dunlop, on the nineteenth day of October, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post-office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies, of a certain paper, print, and publication entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery," at Chicago aforesaid; another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons respectively to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 930 of the said paper, print, and publication, and contained (amongst other things), on the eleventh page thereof and under the headings of "personal" and "baths," certain obscene, lewd, lascivious, and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

JOHN C. BLACK,
United States Attorney.

(Endorsed:) No. 2574. United States district court, northern district of Illinois, northern div. The United States of America *vs.* Joseph R. Dunlop. Indictment on sec. 3893 R. S., sec. 2 act of

Sep. 26, 1888; 1 Suppl. R. S., 621. A true bill. John R. Hayes, foreman. Filed in open court this 24th day of October, A. D. 1895. S. W. Burnham, clerk. Bail, $2,000.00.

24 Afterwards, to wit, on the same day, to wit, on the twenty-fourth day of October, in the October adjourned term of said court, 1895, in the record of proceedings thereof in said entitled cause, before the Hon. Romanzo Bunn, district judge, appears the following entry, to wit:

THE UNITED STATES } vs. JOSEPH R. DUNLOP. } 2574. Vio. § 3893 Postal Laws.

Comes the United States, by John C. Black, Esq., district attorney, and on his motion it is ordered by the court that a bench warrant be awarded for the defendant herein, and that his bail bond be fixed at the sum of two thousand dollars for his appearance to answer the indictment herein.

And afterwards, to wit, the 29th day of October, 1895, a bench warrant was issued out of the clerk's office of said court; which said bench warrant, together with the marshal's return thereon endorsed, is in the words and figures following, to wit:

DISTRICT COURT OF THE UNITED STATES OF AMERICA, *Northern District of Illinois*, } ss:

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to take Joseph R. Dunlop, if he shall be found in your district, and him safely keep, so that you have his body before our judge of our district court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, forthwith, to answer unto the United States of America in an indictment pending in said court against him for violating the
25 postal laws of the United States.

And have you then and there this writ with your return thereon.

Witness the Hon. Peter S. Grosscup, judge of the district court of the United States of America, at Chicago aforesaid, this
[SEAL.] 29th day of October, in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the 120 year.

S. W. BURNHAM, *Clerk.*

Marshal's Return.

Executed by arresting the within-named defendant this 29th day of October, A. D. 1895, and carrying him before the clerk of the U. S. district court, by whom he was released on bond.

JOHN W. ARNOLD,
U. S. Marshal.

Marshal's Fees.

Service	$2 00
1 miles	06
2 " of. & pris	20
Discharge on bond	50
	$2 76

(Endorsed:) Gen. No. 2574. District court of the United States, northern district of Illinois. United States of America *vs.* Joseph R. Dunlop. Bench warrant, returnable forthwith. S. W. Burnham, clerk. Filed Oct. 29th, A. D. 1895. S. W. Burnham, clerk.

26 Afterwards, to wit, on the twenty-ninth day of October, 1895, came Joseph R. Dunlop and filed in the clerk's office of said court in said entitled cause his recognizance; which said recognizance is in the words and figures following, to wit:

District Court of the United States, Northern District of Illinois, Northern Division.

We, Joseph R. Dunlop, Palmer house, as principal, and Hempstead Washburne, 154 Astor St., Chicago, and Henry Siegel, Lakota hotel, as sureties, jointly and severally acknowledge ourselves to be indebted unto the United States of America in the sum of two thousand dollars, lawful money of the said United States, to be levied of our goods and chattels, lands and tenements, upon this condition:

That is, the said Joseph R. Dunlop shall personally be and appear before the district court of the said United States for the northern district of Illinois from day to day during the present term thereof, now being holden at the court-house of the said United States, in the city of Chicago, in the northern division of the said district, and from day to day during subsequent terms of the said court, there to answer to such matters and things as shall be objected against him on behalf the said United States for unlawfully and knowingly depositing and causing to be deposited in the post-office of the United States at Chicago, Ill., for mailing and delivery, a certain printed newspaper called The Chicago Dispatch, containing, amongst other things, certain obscene, lewd,
27 lascivious, and indecent matters in print, and shall abide the order and judgment of the said court in that behalf and not depart the said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

JOSEPH R. DUNLOP. [SEAL.]
HEMPSTEAD WASHBURNE. [SEAL.]
HENRY SIEGEL. [SEAL.]

Subscribed and acknowledged this 29th day of October, 1895, before me—

S. W. BURNHAM,
Clerk U. S. District Court, North. Dist. Illinois.

Approved this 29th day of October, 1895.

S. W. BURNHAM, *Clerk.*

I, Hempstead Washburne, a surety on the annexed bond, being duly sworn, depose and say that I am worth in personal property situate in the northern district of Illinois the sum of two thousand dollars over and above my just debts and liabilities.

HEMPSTEAD WASHBURNE,
Residence, 154 Astor St., Chicago, Ill.

Sworn to and subscribed before me this 29th day of October, 1895.

S. W. BURNHAM, *Clerk.*

I, Henry Siegel, a surety on the annexed bond, being duly sworn, depose and say that I am worth in real estate situate in the northern district of Illinois the sum of two thousand dollars over and above my just debts and liabilities.

HENRY SIEGEL,
Residence, Lakota Hotel.

28 Sworn to and subscribed before me this 29th day of October, 1895.

S. W. BURNHAM, *Clerk.*

(Endorsed:) No. 2574. District court of the United States, northern district of Illinois. The United States *vs.* Joseph R. Dunlop. Recognizance of Joseph R. Dunlop. Filed this 29th day of October, 1895. S. W. Burnham, clerk.

Afterwards, to wit, on the twenty-fourth day of January, 1896, came Joseph R. Dunlop and filed in the clerk's office of said court in said entitled cause his petition for a bill of particulars; which said petition is in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

UNITED STATES OF AMERICA
vs.
JOSEPH R. DUNLOP.

The petitioner, Joseph R. Dunlop, respectfully represents unto this honorable court that he is the Joseph R. Dunlop who is the defendant in the above-entitled indictment; that said indictment consists of thirty-two counts; that each of said counts is for an offense made punishable by section 3893 of the United States Revised Statutes; that each of said counts is for an offense wholly separate and distinct from the offense alleged in every other one of said thirty-two counts; that the matters in every one of said thirty-two counts described as obscene, lewd, lascivious, and indecent are in form and appearance advertisements and notices alleged to have been published in a certain newspaper called The Chicago Dispatch,

under the headings in said newspaper of "personal" and
29 "baths;" that said matters so alleged to have been published in said newspaper are hereinafter, for the sake of brevity and convenience, and for no other purpose, designated as advertisements and notices; that said advertisements and notices in said thirty-two counts of said indictment number altogether three thousand six hundred twenty-five; that said advertisements and notices so alleged to have been published under the heading "personal" number two thousand seven hundred eighty-one; that said advertisements and notices so alleged to have been published under the heading "baths" number eight hundred forty-four; that the minimum number of said advertisements and notices complained of in any one of said counts as obscene, lewd, lascivious, and indecent is seventy; that the maximum number of said advertisements and notices so complained of in any one of said thirty-two counts is one hundred thirty-four.

Your petitioner represents unto this honorable court that he is advised by his counsel that any one of said advertisements or notices so complained of in each and every one of said thirty-two counts of said indictment, namely, the three thousand six hundred twenty-five advertisements and notices, will, if proved to be obscene, lewd, lascivious, and indecent, constitute an obscene print within the meaning of the statutes of the United States, and therefore your petitioner and his counsel must investigate and critically examine all and several the said three thousand six hundred twenty-five advertisements and notices, unless the prayer of your petitioner hereinafter stated for a bill of particulars and other matters is granted by this honorable court.

Your petitioner further states that if the trial of said indictment proceeds on all the counts thereof and your petitioner is required to make his defense on one trial to all of the offenses charged in all of said counts of said indictment, with the district attorney unrestricted in advance as to the number of said three thousand six hun-
30 dred twenty-five advertisements and notices, that he, the said district attorney, will rely upon in part to warrant a verdict of guilty in this case, the defendant and the court and the jury on the trial will necessarily be confused and embarrassed, and the defendant, on the trial, will be surprised and will be unable, prior to the beginning of the trial, to make suitable preparation to sustain his defense.

Your petitioner further states that he has a good and valid defense to said indictment on the merits, and that part of said defense is that all and several said matters so alleged in the divers counts of said indictment to be obscene, lewd, lascivious, and indecent are not obscene, lewd, lascivious, or indecent within the meaning of the laws of the United States.

Your petitioner further states that he verily believes, and he is so advised by his counsel, that the said advertisements and notices so complained of in all and several the said thirty-two counts of said indictment are not such matters as are forbidden by law to be transmitted through the United States mails.

Your petitioner further states that he desires, prior to the trial of said indictment, to raise the question before this court whether, in the judgment of the court, said matters complained of in all and several the counts of said indictment as matters that are obscene, lewd, lascivious, and indecent are obscene, lewd, lascivious, or indecent within the meaning of that statute of the United States upon which this indictment is founded, and that because said matters so alleged to have been published in the said Chicago Dispatch and to have been transmitted through the United States mails in all and several the said thirty-two counts of said indictment are not set forth, either in substance or effect, in any one of the said thirty-two counts of said indictment, it will be impossible for this petitioner to obtain, prior to the trial, such judgment of this court unless the prayer of your petitioner is granted.

Your petitioner therefore prays this honorable court to
31 order the district attorney:

First. To furnish your peti-oner a bill of particulars of the matters alleged in each count of the said indictment to be obscene, lewd, lascivious, and indecent, and to file the same in this court within forty-eight hours after the entry of said order; and,

Second. To elect a number of said advertisements and notices, not to exceed five under each one of the said thirty-two counts of said indictment, as the matters which he, the said district attorney, will rely upon at the trial of this case as the obscene, lewd, lascivious, and indecent matters published in said Chicago Dispatch, and to specify said advertisements and notices so elected in said bill of particulars.

Your petitioner also craves over of all and several the said matters alleged in all and several the said thirty-two counts of said indictment to be obscene, lewd, lascivious, and indecent within forty-eight hours from the time that said over is granted by this court.

Your petitioner also prays that the trial of this case may be stayed until the order, if any, granted by this honorable court is complied with.

JOSEPH R. DUNLOP.

STATE OF ILLINOIS, }
County of Cook, } ss:

Joseph R. Dunlop, being first duly sworn, on his oath states that he is the Joseph R. Dunlop in the foregoing petition named; that he has read the foregoing petition, and that the matters and things set forth in the foregoing petition are true, except those matters which are stated upon information and belief, and these matters affiant believes to be true.

JOSEPH R. DUNLOP.

32 Subscribed and sworn to before me this 24th day of January, A. D. 1896.

[SEAL.] B. C. BACHRACH,
Notary Public.

WILLIAM S. FORREST,
Att'y for Joseph R. Dunlop.

(Endorsed:) No. 2574. In the U. S. district court for N. Illinois, N. div. United States *vs.* Joseph R. Dunlop. Petition for bill of particulars, etc. Filed Jan. 24, 1896. T. C. MacMillan, clerk. W. S. Forrest, att'y for Dunlop.

Afterwards, to wit, on the twenty-seventh day of January, 1896, in the December term of said court, 1895, in the record of proceedings thereof in said cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

THE UNITED STATES *vs.* JOSEPH R. DUNLOP. } 2574. Vio. 3893 Postal Laws.

This cause coming on to be heard upon the motion of the defendant to require the United States attorney to furnish him with a bill of particulars, in this cause come the parties, by their attorneys, and after arguments of counsel the said motion is by the court taken under advisement.

Afterwards, to wit, on the twenty-eighth day of January, 1896, in the December term of said court, 1895, in the record of proceedings thereof in said cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

THE UNITED STATES *vs.* JOSEPH R. DUNLOP. } 2574. Vio. 3893 Postal Laws.

Come the parties, by their attorneys, and this cause having been heard by the court upon the motion of the defendant to require the United States attorney to furnish him with a bill of particu-
33 lars herein, and the said motion having been by the court heard and taken under advisement, and the court being now fully advised in the premises, it is ordered by the court that the said motion be, and the same is hereby, overruled and denied; to which ruling of the court the defendant, by his counsel, excepts.

It is further ordered by the court that the United States attorney be, and he is hereby, required to elect six counts of the indictment herein upon which he will prosecute in this cause.

Afterwards, to wit, on the twenty-ninth day of January, 1896, in the December term of said court, 1895, in the record of proceedings thereof in said cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

THE UNITED STATES *vs.* JOSEPH R. DUNLOP. } 2574. Vio. 3893 Postal Laws.

Come the parties, by their attorneys, and the United States attorney in open court elects to prosecute this cause upon the 1st, 6th,

12th, 16th, 26th, and 32nd counts of the indictment filed herein. It is thereupon ordered by the court that the remaining counts of said indictment be, and the same are hereby, quashed.

Afterwards, to wit, on the thirtieth day of January, 1896, in the December term of said court, 1895, in the record of proceedings thereof in said cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

THE UNITED STATES *vs.* JOSEPH R. DUNLOP. } 2574. Vio. 3893 Postal Laws.

Come the parties, by their attorneys and the defendant in his own proper person, and, being arraigned upon the 1st, 6th, 12th, 16th, 26th, and 32nd counts of the indictment filed herein against him, the defendant pleads not guilty thereto, and for his defense puts himself upon his country; whereupon comes a jury of good
34 and lawful men, to wit, O. Woodruff, Clarence Reed, Wm. McMullen, Anthony Daniels, Henry Butler, Wm. P. St. Clair, Henry S. Howard, M. J. Pitzen, F. M. Higgins, John Rogers, Alfred Bracken, and Jacob Biekelhaupt, who are duly elected, empaneled, and sworn herein a true verdict to render according to the evidence, and the trial of this cause proceeds.

During the hearing of the evidence, the usual hour of adjournment having arrived, it is ordered by the court that the further trial of this cause be continued until tomorrow morning.

Afterwards, to wit, on the thirtieth day of January, 1896, in the December term of said court, 1895, in the record of proceedings thereof in said cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

THE UNITED STATES *vs.* JOSEPH R. DUNLOP. } 2574. Vio. 3893 Postal Laws.

It is ordered by the court that the marshal furnish meals to the jurors engaged in the trial of this cause.

Afterwards, to wit, on the thirty-first day of January, 1896, in the December term of said court, 1895, in the record of proceedings thereof in said cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

THE UNITED STATES *vs.* JOSEPH R. DUNLOP. } 2574. Vio. 3893 Postal Laws.

This being the day to which the further trial of this cause was on yesterday continued, come again the parties, by their attorneys and the defendant in his own proper person; come also the jury who

were duly elected, empaneled, and sworn herein as aforesaid, and the trial of this cause proceeds.

During the examination of the witnesses, the usual hour of adjournment having arrived, it is ordered by the court that the further trial of this cause be continued until tomorrow morning.

35 Afterwards, to wit, on the first day of February, 1896, in the December term of said court, 1895, in the record of proceedings thereof in said cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

THE UNITED STATES
vs.
JOSEPH R. DUNLOP. } 2574. Vio. 3893 Postal Laws.

This being the day to which the further trial of this cause was on yesterday continued, come again the parties, by their attorneys and the defendant in his own proper person; come also the jury who were duly elected, empaneled, and sworn herein as aforesaid, and the trial of this cause proceeds.

During the arguments of counsel, the usual hour of adjournment having arrived, it is ordered by the court that the further trial of this cause be continued until Monday, February 3rd, A. D. 1896.

Afterwards, to wit, on the third day of February, 1896, in the December term of said court, 1895, in the record of proceedings thereof in said cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

THE UNITED STATES
vs.
JOSEPH R. DUNLOP. } 2574. Vio. 3893 Postal Laws.

This being the day to which the further trial of this cause was continued, come again the parties, by their attorneys and the defendant in his own proper person; come also the jury who were duly elected, empaneled, and sworn herein as aforesaid, and the trial of this cause proceeds.

Having heard the evidence by the parties adduced, arguments of counsel, and charge of the court, the jury retire to their room to consider of their verdict.

Afterwards, to wit, on the fourth day of February, 1896, in the December term of said court, 1895, in the record of proceedings thereof in said cause, before the Hon. Peter S. Grosscup, dis-
36 trict judge, appears the following entry, to wit:

THE UNITED STATES
vs.
JOSEPH R. DUNLOP. } 2574. Vio. 3893 Postal Laws.

Come again the parties, by their attorneys and the defendant in his own proper person; come also the jury who were duly elected,

empaneled, and sworn herein as aforesaid and who, having heard the evidence by the parties adduced, arguments of counsel, and charge of the court, retired on yesterday to consider of their verdict, and now, after due consideration, return into court and render their verdict and upon their oaths do say: We, the jury, find the defendant guilty as charged in the indictment.

The defendant, by his counsel, thereupon moves the court for a new trial of this cause.

And afterwards, to wit, on the eighth day of February, A. D. 1896, a motion of the defendant for a new trial of said cause was filed, said motion being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

UNITED STATES OF AMERICA
vs.
JOSEPH R. DUNLOP. } Motion for a New Trial.

And now comes the said defendant, Joseph R. Dunlop, by his attorney, William S. Forrest, a- moves the court to set aside the verdict of the jury and to grant a new trial in the above-entitled cause on the following grounds:

1.

The court erred in refusing to require the district attorney, prior to the trial, to file in court copies of the Chicago Dispatch,
37 in order to enable the defendant to demur to the indictment and the several counts thereof prior to the beginning of the trial.

2.

The court erred in the charge to the jury in using the following language to the jury against the defendant's objection:

"That after that time he continued to receive that Dispatch. It was brought to his office by his messenger, supposedly from the post-office, though he himself personally does not know."

3.

The court erred in the charge in using the following language to the jury against the defendant's objection:

"Now, the testimony of the Government also tends to show that as a matter of fact the Dispatch during this period was delivered at the round table for mailing purposes; that it was delivered there in considerable quantities, and its weights taken by the weigher of the Post-office Department and reported to the clerk, whose duty it was to record it."

4.

The court erred in the charge in using the following language to the jury against the defendant's objection :

"So that you are at liberty to take all these facts together, consider *it* together, and if upon that consideration as a whole you have no reasonable doubt but what the Dispatch was deposited in the office, you are at liberty to find that it was so deposited, notwithstanding the fact that no witness saw it so deposited."

5.

The court erred in the charge in instructing the jury as follows, against the defendant's objection :

"If, on the other hand, with all these facts in mind and giving each its due credit in weighing the probabilities, you can see
38 some reasonable ground for believing of or doubting that these particular papers were deposited in the post-office, you must give to the defendant the benefit of that doubt. It is your duty to come to a conclusion upon all those facts and the effect of all those facts the same as you would conscientiously come to a conclusion upon any other set of facts that come before you in life."

6.

The court erred in the charge in using the following language to the jury :

"There is no technical rule, there is no limitation in courts of justice that prevents you from applying to them just the same rules of good common sense, subject always, of course, to a conscientious exercise of that common sense that you would apply to any other subject that came under your consideration and that demanded your judgment."

7.

The court erred in the charge in using the following language to the jury against the defendant's objection :

"If after having done that you have no reasonable doubt that these papers were deposited in the post-office, it is your duty to so find that fact ; if you have, then, as I said before, give to the defendant the benefit of the doubt."

8.

The court erred in the charge in using the following language to the jury against the defendant's objection :

"That raises the question as to whether the defendant is the publisher of this paper or has such a connection with the paper that he must be held responsible as the publisher and deliverer of the paper. If the defendant holds such an office in the management of the Dispatch that whatever anybody else does with the Dispatch is under his guidance, with his assent, then he is responsible
39 for that act just as much as if he had done it with his own hands ; so you must ascertain from the evidence whether he

is the publisher, and whether as such publisher he knew that the paper was going through the post-office."

9.

The court erred in the charge in using the following language to the jury against the defendant's objection:

"The paper itself introduced in evidence contains on one of its pages the statement that it is published by Joseph R. Dunlop, and in response to an inquiry by the court of one of the witnesses it was said that it was not known that there was any other Joseph R. Dunlop in the newspaper business in the city of Chicago."

10.

The court erred in his charge in using the following language to the jury against the defendant's objection:

"Now, taking these facts al- together, is there any reasonable doubt in your mind that the Joseph R. Dunlop on trial before you is the publisher of this paper, or is there any reasonable doubt in your mind that when these papers were deposited in the post-office, if they were so deposited, it was done with his assent or knowledge? If there is not, then it is your duty to find these facts in favor of the Government. If there is, you must give, as I said before, to the defendant the benefit of that doubt."

11.

The court erred in the charge in using the following language to the jury against the defendant's objection:

"Now, what is obscene, lascivious, lewd, or indecent publication is largely a question of your own conscience and your own opinion, but it must come before it can be said to be such literature or publication—it must come up to this point: that it must be calculated with the ordinary reader—to deprave him, deprave his morals, or lead to impure purposes."

40

12.

The court erred in the charge in using the following language to the jury against the defendant's objection:

"Now, reading these paragraphs that counsel have called to your attention—and you will take them with you to your jury-room—it is your duty to ascertain, in the first place, if they are calculated to deprave the morals; if they are calculated to lower that standard which we regard as essential to civilization; if they are calculated to excite those feelings which in their proper field are all right, but which, transcending the limits of that proper field, play most of the mischief in the world. If they are, then they are obscene, lewd, and lascivious within the meaning of the statute; if not, then they are not so within the meaning of the statute."

13.

The court erred in the charge in refusing, against the defendant's objection, to give the jury the following instruction requested by the defendant's counsel:

"The court instructs the jury that the presumption of innocence in this case is stronger than the presumption that the Government employee who delivered the newspapers to Mr. Montgomery in the Chicago post-office building obtained said newspapers from the United States mails."

14.

The court erred in the charge in refusing, against the defendant's objection, to give the jury the following instruction requested by the defendant's counsel:

"The court instructs the jury that the presumption of innocence in this case is stronger than the presumption that the person who deposited the copies of the Chicago Dispatch in the box in the St. Louis post-office building, from which box the witness Mc-
41 Afee took said papers, obtained said newspapers from the United States mails."

15.

The court erred in the charge in refusing, against the defendant's objection, to give the jury the following instruction requested by the defendant's counsel:

"The court instructs the jury that the office of the witness, Mr. Montgomery, in the post-office building, in the city of Chicago, is not a part of the post-office within the meaning of the law upon which this indictment is based."

16.

The court erred in the charge in refusing, against the defendant's objection, to give the jury the following instruction requested by the defendant's counsel:

"The court instructs the jury that the place where the witness McAfee found certain newspapers in the city of St. Louis, Missouri, namely, the post-office inspector's office, is not a part of the post-office at St. Louis within the meaning of the law upon which this indictment is based."

17.

The court erred in the charge in refusing, against the defendant's objection, to give the jury the following instruction requested by the defendant's counsel:

"The court instructs the jury that there is no evidence in this case tending to show that the newspapers containing the address R. M. Williams came from or were taken from the post-office at St. Louis, Missouri.

18.

The court erred in the charge in refusing, against the defendant's objection, to give the jury the following instruction requested by the defendant's counsel:

"The court instructs the jury that if they believe from all
42 the evidence in this case that it was in the power of the Government to produce as witnesses in this case the persons who it is claimed by the Government took the newspapers addressed to R. M. Williams from the post-office at St. Louis, or the newspapers addressed to Mr. Montgomery from the round table in the post-office in Chicago, then the jury are at liberty to draw the inference that the Government did not produce said persons as witnesses because the Government officers conducting the prosecution believed or feared that the testimony of such witnesses, if produced, would not tend to support the theory of the prosecution in this case."

19.

The court erred in the charge in refusing, against the defendant's objection, to give the jury the following instruction requested by the defendant's counsel:

"That in dealing with circumstantial evidence an inference from an inference is strictly forbidden, and that therefore the jury are not at liberty in this case to assume that the clerk in the post-office inspector's office at St. Louis, Missouri, did his duty, and then to infer from the assumed fact that said chief clerk did his duty that said chief clerk took the newspapers addressed to R. M. Williams from the post-office at St. Louis, Missouri."

30.

The court erred in the charge in refusing, against the defendant's objection, to give the jury the following instruction requested by the defendant's counsel:

"And the jury are further instructed that they are not at liberty in this case to assume that the person or persons whose custom it was to bring the Chicago Dispatch to Mr. Montgomery followed that custom or did his or their duty and took the newspapers addressed to Mr. Montgomery from the so-called round table in the post-office at Chicago, Illinois, and then infer from the as-
43 sumed fact that such person or persons so followed the usual custom or did their duty that said newspapers were actually deposited in the post-office at Chicago, Illinois, for mailing."

21.

The court erred in the charge in refusing, against the defendant's objection, to give the jury the following instruction requested by the defendant's counsel:

"The court instructs the jury that any circumstance which is essential to a conclusion of guilt against the defendant should be established beyond all reasonable doubt before it can be used by the jury against the defendant."

22.

The court erred in the charge in refusing, against the defendant's objection, to give the jury the following instruction requested by the defendant's counsel:

"The court instructs the jury that in order to justify the inference of guilt from circumstantial evidence the existence of the inculpatory facts must be inconsistent with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. If you can reconcile the facts in this case on any reasonable theory consistent with the innocence of the defendant, it is your duty so to do and to find the defendant not guilty."

23.

The court erred in the charge in omitting to require the jury to find that the newspapers admitted in evidence were deposited in the post-office at Chicago, Illinois.

24.

The court erred in admitting in evidence, against the defendant's objection, for the purpose of showing who was the publisher of the Chicago Dispatch, so much of what purported to be a copy
44 of the Chicago Dispatch and every line thereof of December 3rd, 1895, as was admitted in evidence, to wit, the first four lines of the first column of the editorial page of said copy of the Chicago Dispatch, said editorial page being page — of said copy of said Chicago Dispatch.

25.

The court erred in admitting in evidence, against the defendant's objection, what purported to be a copy of the Chicago Dispatch for December 3rd, 1895, for the purpose of proving by said copy that the same was a copy of the Chicago Dispatch.

26.

The court erred in admitting in evidence, against the defendant's objection, what purported to be copies of the Chicago Dispatch for the 6th day of July, 1895, for the 27th day of July, 1895, for the 10th day of August, 1895, for the 14th day of September, 1895, and for the 19th day of October, 1895, for the purpose of proving by said papers, so purporting to be copies of said Chicago Dispatch of said dates, that Joseph R. Dunlop was the publisher of said Chicago Dispatch on said several dates in this specification mentioned.

27.

The court erred in refusing to exclude from the evidence and from the consideration of the jury, against the defendant's objection, what purported to be copies of the Chicago Dispatch for the following dates, to wit: July 6th, 1895, July 27th, 1895, August 10th, 1895, and September 14th, 1895.

28.

The court erred in admitting, against the defendant's objection, evidence that tended to show that the publication entitled the Chicago Dispatch has been going through the post-office during the past three or four years.

29.

The court erred in admitting in evidence, against the de-
45 fendant's objection, all and several the following matters testified to by the witnesses Morse and Highland, to wit, that the witness Francis A. Morse weighed daily, except during two weeks, all the copies of the Chicago Dispatch that were received in the Chicago post-office, Illinois, from the 1st day of July, 1895, till the 1st day of November, 1895; the memoranda containing the weights of the copies of the Chicago Dispatch received at the Chicago post-office, Illinois, on July 6th, 1895, August 10th, 1895, September 14th, 1895, and on October 19th, 1895; that it was the duty of said witness Morse to make such memoranda at the time he, said Morse, weighed said copies of the Chicago Dispatch respectively; that the witness Highland weighed the copies of the Chicago Dispatch received at the Chicago post-office, Illinois, on the 27th day of July, 1895, and August 10th, 1895, respectively; and the memoranda of the weights of said copies of the Chicago Dispatch so received by said H. R. Highland on said 27th day of July and 10th day of August, 1895.

30.

The court erred in admitting in evidence, against the defendant's objection, the testimony given by Benjamin Cohen, which tended to show the duties of said Cohen as clerk of the post-office at Chicago, in Illinois, the custom at the said Chicago post-office with reference to receiving pay for all second-class matter that came into said post-office.

31.

The court erred in admitting in evidence, against the defendant's objection, so much testimony of the witness T. J. Olander as tended to show that divers copies of the Chicago Dispatch went through the Chicago post-office, Illinois, daily from the 1st day of July to the 31st day of October, 1895, with the exception of Fridays
46 and Sundays, during said interval.

32.

The court erred in admitting in evidence, against the objection of defendant's counsel, so much of the testimony of the witness Robert McAfee as tended to show the duties of the chief clerk of the post-office inspector's office in the city of St. Louis, Missouri, during the months of July, August, September, and October, 1895.

33.

The court erred in admitting in evidence, against the defendant's objection, all and several the following papers, to wit, a paper purporting to be a copy of the Chicago Dispatch, dated July 6th, 1895, addressed to R. M. Williams; another paper, purporting to a copy of the Chicago Dispatch, dated July 6th, 1895, and addressed to Mr. Montgomery; another paper, purporting to be a copy of the Chicago Dispatch, dated August 10th, 1895, addressed to R. M. Williams; another paper, purporting to be a copy of the Chicago Dispatch, dated August 10th, 1895, addressed to Mr. Montgomery; a paper, purporting to be a copy of the Chicago Dispatch, dated July 27th, 1895, and addressed to R. M. Williams; another paper, purporting to be a copy of the Chicago Dispatch, dated July 27th, 1895, and addressed to Mr. Montgomery; a paper purporting to be a copy of the Chicago Dispatch, dated September 14th, 1895, and addressed to R. M. Williams; another paper, purporting to be a copy of the Chicago Dispatch, dated September 14th, 1895, and addressed to Mr. Montgomery; a paper purporting to be a copy of the Chicago Dispatch, dated October 19th, 1895, and addressed to R. M. Williams; another paper, purporting to be a copy of the Chicago Dispatch, dated October 19th, 1895, and addressed to Mr. Montgomery, said papers being admitted in evidence to prove the publication of matters that are obscene, lewd, lascivious, and indecent, as alleged in the several counts of the indictment for which the defendant was tried.

47 34.

The court erred in admitting in evidence, against the defendant's objection, memoranda made by the witness Walter G. Henry and marked respectively "Government Exhibit 19," "Government Exhibit 20," and "Government Exhibit 21."

35.

The court erred in admitting on the trial improper and illegal evidence on behalf of the United States, against the defendant's objection.

36.

The court erred in refusing to admit on the trial proper evidence offered by the defendant, against the defendant's objection.

37.

The court erred in giving the jury illegal and improper instructions on behalf of the Government, against the defendant's objection.

38.

The court erred in refusing to give the jury proper and legal instructions requested by the defendant, against the defendant's objection.

39.

The verdict is not supported by the evidence.

40.

The verdict is contrary to the law and the evidence in the case.

41.

The defendant has not had a full, fair, and impartial trial.

42.

The defendant was seriously prejudiced by the following language used by the counsel for the Government in his argument to
48 the jury, against the objection and exception of defendant's counsel, after the testimony for both parties was closed:

"There is not a single line or word of evidence in this case disputing the fact that Dunlop for two years past, at least, has been the proprietor, the publisher, and manager of this paper.

"I do not believe there are twelve men that could be gathered by the venire of this court within the confines of the State of Illinois, except where they were bought and prejudiced in advance, whose verdict I would not be willing to take upon the question of the indecency, the lewdness, lasciviousness, licentiousness, and wrong of those publications.

"Now, gentlemen, it is not necessary for me to tell you what the massage treatment is—how a man is stripped naked from the sole of his feet to the crown of his head and rubbed with the hands——

43.

The court erred in making the following ruling in the presence and hearing of the jury, in response to an objection by defendant's counsel to what the United States district attorney had said with reference to what massage treatment is:

"The COURT: Well, I suppose massage, like walking, is so well known that everybody knows what it is. I do not suppose there would be any harm in the district attorney stating what walking is.

Mr. FORREST: Certainly not.

The COURT: Then I do not think there is any impropriety in the district attorney stating what the massage treatment is."

44.

The court erred in refusing to hold, against the defendant's objection, that the alligation in all and several the counts of the indictment on which trial was had, to the effect that the matters in print alleged to be obscene were of too great length and of too indecent character to be set forth in full, was an essential averment
49 and must be proved as stated, and also that *that* the divers *divers* papers offered in evidence as newspapers containing

obscene, lewd, lascivious, and indecent papers in print failed to prove said allegation in this specification above set forth.

WILLIAM S. FORREST,
Attorney for Defendant.

(Endorsed:) No. 2574. In the United States dist. court for northern Illinois, northern div. United States of America *vs.* Joseph R. Dunlop. Motion for new trial. Filed Feb. 8th, 1896. T. C. MacMillan, clerk. William S. Forrest, attorney for def't.

Afterwards, to wit, on the eighth day of February, A. D. 1896, in the December term of said court, 1895, in the record of proceedings thereof in said cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

THE UNITED STATES
vs. } 2574. Vio. 3893 Postal Laws.
JOSEPH R. DUNLOP.

This cause coming on to be heard upon the motion of the defendant for a new trial, come the parties, by their attorneys, and the defendant in his own proper person, and, after argument of counsel and due consideration, it is ordered by the court that the said motion be, and the same is hereby, overruled and denied; to which ruling of the court the defendant, by his counsel, excepts.

And afterwards, to wit, on the eighth day of February, A. D. 1896, a motion of the defendant in arrest of the judgment of the court in this cause was filed, said motion being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

50 UNITED STATES OF AMERICA
vs. } Motion in Arrest of Judgment.
JOSEPH R. DUNLOP.

And now comes the defendant, Joseph R. Dunlop, by his attorney, William S. Forrest, and moves the court to arrest the judgment in the above-entitled case on the following ground:

All and several the counts in the said indictment are insufficient in this, that they all and several do not charge an offense against the said United States.

WILLIAM S. FORREST,
Attorney for Defendant, Joseph R. Dunlop.

(Endorsed:) No. 2574. In the dist. court of U. S. A., northern dist of Ill., N. div. United States *vs.* Jos. R. Dunlop. Motion in arrest of judgment. Filed Feb. 8th, 1896. T. C. MacMillan, clerk. William S. Forrest, att'y for Jos. R. Dunlop.

Afterwards, to wit, on the eighth day of February, A. D. 1896, in the December term of said court, 1895, in the record of proceedings thereof in said cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

THE UNITED STATES
vs.
JOSEPH R. DUNLOP. } 2574. Vio. 3893 Postal Laws.

This cause coming on to be heard upon the motion of the defendant in arrest of the judgment of the court herein, come the parties, by their attorneys, and the defendant in his own proper person, and after argument of counsel and due consideration, it is ordered by the court that the said motion be, and the same is hereby, overruled and denied; to which ruling of the court the defendant, by his counsel, excepts.

Afterwards, to wit, on the eighth day of February, A. D. 1896, in the December term of said court, 1895, in the record of proceedings thereof in said cause, before the Hon. Peter S. Grosscup, dis-
51 trict judge, appears the following entry, to wit:

THE UNITED STATES
vs.
JOSEPH R. DUNLOP. } 2574. Vio. 3893 Postal Laws.

Come the parties, by their attorneys, and the defendant in his own proper person to have the sentence and judgment of the court pronounced upon him, he having heretofore, to wit, on the fourth day of February, A. D. 1896, one of the days of this term of this court, been adjudged guilty by a jury in due form of law, as charged in the indictment filed herein against him; and the said defendant being asked by the court if he had anything to say why the sentence and judgment of the court should not now be pronounced upon him, and showing no good and sufficient reason why sentence and judgment should not be pronounced, it is therefore considered by the court, and as the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury as aforesaid, that the defendant, Joseph R. Dunlop, be confined and imprisoned at hard labor in the penitentiary at Joliet, in the State of Illinois, for and during a period of two years, and that he forfeit and pay to the United States a fine in the sum of two thousand dollars, besides the costs in this behalf expended, for which let execution issue.

It is further ordered by the court that execution of the sentence and judgment in this cause be stayed for twenty days from this date, and that the defendant be released for that period upon giving bond, with good and sufficient surety, in the sum of ten thousand dollars, to abide the further order of the court herein, said bond to be approved by the clerk of this court, and that the defendant be allowed twenty days from this date within which to file his bill of exceptions and his petition for a writ of error in this cause.

Afterwards, to wit, on the eighth day of February, 1896, came Joseph R. Dunlop and filed in the clerk's office of said court in said entitled cause his recognizance; which said recognizance is in
52 the words and figures following, to wit:

District Court of the United States, Northern District of Illinois, Northern Division.

We, Joseph R. Dunlop, as principal, and Henry Siegel and Joseph Fish, as sureties, jointly and severally acknowledge ourselves to be indebted unto the United States of America in the sum of ten thousand dollars, lawful money of the said United States, to be levied of our goods and chattels, lands and tenements, upon this condition:

That if the said Joseph R. Dunlop shall personally be and appear before the district court of the said United States for the northern district of Illinois from day to day during the present term thereof, now being holden at the court-house of the said United States, in the city of Chicago, in the northern division of the said district, and from day to day during subsequent terms of the said court, there to answer to such matters and things as shall be objected against him on behalf of the said United States for violating the postal laws of the United States by unlawfully and knowingly depositing and causing to be deposited in the post-office of the United States at Chicago, Illinois, for mailing and delivery, a certain printed newspaper called the Chicago Dispatch, which said paper contained, amongst other things, certain obscene, lewd, lascivious, and indecent matters in print, and shall abide the further orders and judgment of the said court in that behalf and not depart the said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

JOSEPH R. DUNLOP. [SEAL.]
HENRY SIEGEL. [SEAL.]
JOSEPH FISH. [SEAL.]

Subscribed and acknowledged this 8th day of February, 1896, before me—

T. C. MACMILLAN,
Clerk U. S. District Court, North. Dist. Illinois.

53 Approved this 8th day of February, 1896.

T. C. MACMILLAN, *Clerk.*

I, Henry Siegel, a surety on the annexed bond, being duly sworn, depose and say that I am worth in real estate situate in the northern district of Illinois the sum of fifty thousand dollars over and above my just debts and liabilities.

HENRY SIEGEL,
Residence, Siegel, Cooper & Co.

Sworn to and subscribed before me this 8th day of February, 1896.

T. C. MACMILLAN, *Clerk.*

I, Joseph Fish, a surety on the annexed bond, being duly sworn, depose and say that I am worth in personal property situate in the northern district of Illinois the sum of fifty thousand dollars over and above my just debts and liabilities.

JOSEPH FISH,
Residence, 165 *State St.*

Sworn to and subscribed before me this 8th day of February, 1896.

T. C. MACMILLAN, *Clerk.*

(Endorsed :) No. 2574. District court of the United States, northern district of Illinois. The United States *vs.* Joseph R. Dunlop. Recognizance of Joseph R. Dunlop. Filed this 8th day of February, 1896. T. C. MacMillan, clerk.

On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

54 In the District Court of the United States of America for the Northern District of Illinois, Northern Division, December Term, A. D. 1895.

UNITED STATES OF AMERICA
vs.
JOSEPH R. DUNLOP.

Be it remembered that heretofore, to wit, on the twenty-fourth day of January, A. D. 1896, the said defendant, by his counsel, filed in said court a certain petition, supported by affidavit, to require the district attorney to furnish the defendant, prior to the trial, a bill of particulars, and also to require the district attorney, prior to the trial, to file in this court, in the above-entitled cause, the printed matters which were alleged in the indictment to be obscene, lewd, lascivious, and indecent; which said petition, so supported by said affidavit, is in the words and figures following, to wit:

55 In the District Court of the United States of America for the Northern District of Illinois, Northern Division, December Term, A. D. 1895.

UNITED STATES OF AMERICA
vs.
JOSEPH R. DUNLOP.

The petitioner, Joseph R. Dunlop, respectfully represents unto this honorable court that he is the Joseph R. Dunlop who is the defendant in the above-entitled indictment; that said indictment consists of thirty-two counts; that each of said counts is for an offense made punishable by section 3893 of the United States Revised Statutes; that each of said counts is for an offense wholly separate and distinct

from the offense alleged in every other one of said thirty-two counts; that the matters in every one of said thirty-two counts described as obscene, lewd, lascivious, and indecent are in form and appearance advertisements and notices alleged to have been published in a certain newspaper called the Chicago Dispatch, under the headings in said newspaper of "personal" and "baths;" that said matters so alleged to have been published in said newspapers are hereinafter, for the sake of brevity and convenience and for no other purpose, designated as advertisements and notices; that said adver-
56 tisements and notices in said thirty-two counts of said indictment number altogether three thousand six hundred twenty-five; that said advertisements and notices so alleged to have been published under the heading "personal" number two thousand seven hundred eighty-one; that said advertisements and notices so alleged to have been published under the heading "baths" number eight hundred forty-four; that the minimum number of said advertisements and notices complained of in any one of said counts as obscene, lewd, lascivious, and indecent is seventy; that the maximum number of said advertisements and notices as complained of in any one of said thirty-two counts is one hundred and thirty-four.

Your petitioner represents unto this honorable court that he is advised by his counsel that any one of said advertisements or notices so complained of in each and every one of said thirty-two counts of said indictment, namely, the three thousand six hundred twenty-five advertisements and notices, will, if proved to be obscene, lewd, lascivious, and indecent, constitute an obscene print within the meaning of the statutes of the United States, and therefore your petitioner and his counsel must investigate and critically examine all and several the said three thousand six hundred twenty-five advertisements and notices unless the prayer of your petitioner, hereinafter stated, for a bill of particulars and other matters, is granted by this honorable court.

57 Your petitioner further states that if the trial of said indictment proceeds on all the counts thereof and your petitioner is required to make his defense on one trial to all of the offenses charged in all of said counts of said indictment, with the district attorney unrestricted in advance as to the number of said three thousand six hundred twenty-five advertisements and notices that he, the said district attorney, will rely upon in part to warrant a verdict of guilty in this case, the defendant and the court and the jury on the trial will necessarily be confused and embarrassed, and the defendant also on the trial will be surprised and will be unable, prior to the beginning of the trial, to make suitable preparation to sustain his defense.

Your petitioner further states that he has a good and valid defense to said indictment on the merits, and that part of said defense is that all and several said matters so alleged in the divers counts of said indictment to be obscene, lewd, lascivious, and indecent are not obscene, lewd, lascivious, or indecent within the meaning of the laws of the United States.

Your petitioner further states that he verily believes and he is advised by his counsel that the said advertisements and notices so complained of in all and several the said thirty-two counts of said indictment are not such matters as are forbidden by law to be transmitted through the United States mails.

58 Your petitioner further states that he desires, prior to the trial of said indictment, to raise the question before this court whether, in the judgment of the court, said matters complained of in all and several the counts of said indictment as matters that are obscene, lewd, lascivious, and indecent are obscene, lewd, lascivious, and indecent within the meaning of that statute of the United States upon which this indictment is founded, and that because said matters so alleged to have been published in the said Chicago Dispatch and to have been transmitted through the United States mails in all and several the said thirty-two counts of said indictment are not set forth, either in substance or effect, in any one of the said thirty-two counts of said indictment it will be impossible for this petitioner to obtain, prior to the trial, such judgment of this court unless the prayer of your petitioner is granted.

Your petitioner therefore prays this honorable court to order the district attorney:

First. To furnish your petitioner a bill of particulars of the matters alleged in each count of the said indictment to be obscene, lewd, lascivious, and indecent, and to file the same in this court within forty-eight hours after the entry of said order; and,

Second. To elect a number of said advertisements and notices, not to exceed five under each one of the said thirty-two

59 counts of said indictment, as the matters which he, the said district attorney, will rely upon at the trial of this case as the obscene, lewd, lascivious, and indecent matters published in said Chicago Dispatch, and to specify said advertisements and notices so elected in said bill of particulars.

Your petitioner also craves oyer of all and several the said matters alleged in all and several the said thirty-two counts of said indictment to be obscene, lewd, lascivious, and indecent within forty-eight hours from the time that said oyer is granted by this court.

Your petitioner also prays that the trial of this case may be stayed until the order, if any, granted by this honorable court is complied with.

(Signed) JOSEPH R. DUNLOP.

STATE OF ILLINOIS, } ss:
County of Cook, }

Joseph R. Dunlop, being first duly sworn, on his oath states that he is the Joseph R. Dunlop in the foregoing petition named; that he has read the foregoing petition, and that the matters and things set forth in the foregoing petition are true except those mat-

60 ters which are stated upon information and belief, and those matters affiant believes to be true.

(Signed) JOSEPH R. DUNLOP.

Subscribed and sworn to before me this 24th day of January, A. D. 1896.

[SEAL.] B. C. BACHARACH,
Notary Public.

(Signed) W. S. FORREST,
Attorney for said Joseph R. Dunlop.

And thereupon the court denied the prayer of the petitione above set forth and refused to order the district attorney to furnish the defendant a bill of particulars or to file the printed matter alleged in all and several the counts of the indictment to be obscene, lewd, lascivious, and indecent.

To the ruling of the court in denying said petition and to the ruling of the court in refusing to require the district attorney to file a copy of the printed matter alleged in all and several the counts of the indictment to be obscene, lewd, lascivious, and indecent the defendant, by his counsel, then and there duly excepted.

61 Be it further remembered that afterwards, to wit, on the thirtieth day of January, in the year of our Lord 1896, said cause came on to be heard before the court and jury, the United States appearing by the district attorney and the defendant appearing by William S. Forrest, Esq., and in person; and the United States, to maintain the issues on its part, introduced the following evidence, to wit:

ROBERT MCAFEE, being first duly sworn on behalf of the Government, testified:

I am a post-office inspector, in the service of the United States. I have known the defendant, Joseph R. Dunlop, about 15 years; am acquainted with the publication called the Chicago Dispatch. I have seen copies of the Chicago Dispatch. There have been about 900 issues of the Chicago Dispatch. It is a daily and weekly newspaper. I have talked several times with Mr. Dunlop about the publication of this paper. I spoke with him several times prior to August 30th, 1894, and on August 30th, 1894. On August 30th, 1894, Inspector W. S. Meyer and I called upon the defendant, Joseph R. Dunlop, at the Dispatch office with reference to the publication of the Dispatch. I told Joseph R. Dunlop that we had been sent there to see him about complaints concerning the Dis-
62 patch, and I asked him if he was the responsible head of that business, and he said he was. We told him that there were complaints made about the character of the paper; that the complaints had been submitted to the United States district attorney, who had directed me to advise him that in his opinion the advertisements under the head "personals" and "baths," when they were susceptible of two interpretations—that is, that the houses were legitimate ones and also illegitimate ones—and the facts showed that the advertisements referred to the illegitimate ones, that the newspaper was within the inhibition of the postal laws and non-mailable; that

I had been advised that investigations as to some of the places advertised in the Dispatch showed that they were of such a character. The defendant, Dunlop, said that he had no desire to violate any postal laws and did not intend to do so; that he scarcely ever saw the advertisements of the newspaper until after they had been published; that he had a man who received such advertisements; that this man had been recently instructed by him to scrutinize those advertisements with more care, and to exclude those that were clearly objectionable. Mr. Dunlop said that all of the newspapers had carried such advertisements in times past until they became wealthy and they complained about others that did the same thing; that people who had been exposed by the Dispatch were
complainants also. We told him that we knew nothing of
63 the origin of the complaints. He said that he was very desirous to keep his papers within the requirements of the postal laws. Then we discussed some of the advertisements.

The following day I received a telephone message that Mr. Dunlop desired to see us. Inspector W. S. Meyer called with me upon Mr. Dunlop. We took with us a copy of the issue of the Chicago Dispatch for August 29th, with a number of the advertisements therein marked. We discussed quite a number of them. Mr. Dunlop then desired us to tell him how he might know what advertisements were mailable and what not. We told him we were prohibited from applying the postal laws to any specific cases. As well as I could, I quoted to him the postal laws and such court rulings on the subject as I had at hand, and suggested that he should be sure that he was right before he went ahead. Dunlop said that was a good suggestion.

I had a subsequent conversation with Mr. Dunlop prior to June 1st, 1895, at the Palmer house, in Chicago. Mr. Dunlop approached me and began to tell me about some alleged obscene literature that he had heard of in the city, and which he thought I ought to give some attention to. Then the subject of the Dispatch came up, and I told him we were receiving a great many complaints and threats around the post-office about the advertisements in the Dispatch, and
that it was only a matter of time, in my judgment, when, if
64 continued, it would be brought to the attention of the court. He talked much as he did before in the way of his desire to keep it right. He said the fact was that he was publishing a metropolitan paper, and all those things were phases of metropolitan life, and he did not see where to draw the line. In that conversation I adverted to the advertisements in the columns marked "personal" and "baths," the only ones that I have received complaints about. In that conversation I told him that I had received complaints about the advertisements in the columns marked "personal" and "baths." In that conversation I spoke to him as if he was the owner of the paper, but I said nothing to him on that subject.

I have talked with the defendant, Dunlop, about the mailing of the Dispatch prior to August 30th, 1894—that is, about the mailing of the copies of the Dispatch which contained lottery advertisements.

As to those copies Mr. Dunlop explained to me that in each instance the edition which contained the lottery advertisements was never put in the mail, and he furnished me satisfactory proof that that was the case by calling the manager of the paper and saying that he and the manager would make an affidavit to that effect.

The only means I have of knowing who is the publisher of the Dispatch is from its appearance.

Thereupon a printed paper was marked Government Exhibit 1 and placed in the hands of the witness. The date of this
65 paper, namely, the paper marked Government Exhibit 1, is December 3rd, 1894.

Thereupon said paper so marked Government Exhibit 1 was handed to the court.

Mr. JOHN C. BLACK: I tender a copy of the Dispatch—the Chicago Dispatch of Tuesday, December 3rd, 1894—and call attention to the editorial page and the first 40 lines of the first column of that page for the purpose of showing the responsible editor of the paper.

Defendant objected to the admission of the paper—first, to all of the paper; and, secondly, to so much of it as is not clearly within the offer made; thirdly, that neither the whole paper nor what is offered tends to show who the publisher is; and, finally, that there is no proof that said paper ever came from the office of the Chicago Dispatch or is a copy of the Chicago Dispatch of December 3rd, 1894.

Objection overruled by the court.

To which ruling of the court the defendant then and there duly excepted.

The following portion of said paper so marked Government Exhibit 1 was admitted in evidence.

66 GOVERNMENT EXHIBIT 1.

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY—12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

—AND—

Official Paper of Cook County.

Dispatch Building, 115–117 Fifth Avenue

TELEPHONES:

Business Offices 3495
Editorial Department . . . 3494

TERMS OF SUBSCRIPTIONS:

By mail, postage paid, one year. $8.50
By mail, postage paid, six months..... 2 00
By mail, postage paid, three months..... 1.25
(Mail subscriptions strictly in advance.)

THE DISPATCH,
115-117 Fifth Avenue, Chicago, Ill.

NEW YORK OFFICE.
86 World Building.....Max H. Fischer, Manager.

MONDAY, DECEMBER 3, 1894.

EIGHT PAGES

Whereupon the witness McAfee produced a paper that purported to be a copy of the Chicago Dispatch for Saturday, July 6th, 1895, and another paper which purported to be a copy of the Chicago Dispatch for July 27th, 1895, and another paper which purported to be a copy of the Chicago Dispatch for August 10th, 1895, and another paper which purported to be a copy of the Chicago Dispatch for September 14th, 1895, and another paper which purported to be a copy of the Chicago Dispatch for October 19th, 1895.

67 Whereupon the counsel for the United States offered in evidence the following portion of said paper so purporting to be a copy of the Chicago Dispatch for July 6th, 1895:

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY—12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

—AND—

Official Paper of Cook County.

Dispatch Building, 115–117 Fifth Avenue

TELEPHONES:

Business Offices 3495
Editorial Department . . . 3494

TERMS OF SUBSCRIPTIONS:

By mail, postage paid, one year.....$3.50
By mail, postage paid, six months..... 2.00
By mail, postage paid, three months..... 1.25
(Mail subscriptions strictly in advance.)

THE DISPATCH,
115-117 Fifth Avenue, Chicago, Ill.

NEW YORK OFFICE.
41 Times Building.....R. A. Craig, Manager.

TWELVE PAGES

SATURDAY, JULY 6, 1895.

To the admission of such portion of said paper so purporting to be a copy of the Chicago Dispatch for July 6th, 1895, the defendant, by his counsel, then and there duly objected on the ground that nothing contained therein tends to show who the publisher of the Chicago Dispatch was on said July 6th, 1895; and, further, that there is no proof that said paper is a copy of the Chicago Dispatch.

Objection overruled.

To which ruling in so overruling the objection of the defendant's counsel the defendant, by his counsel, then and there duly excepted.

68 Thereupon the counsel for the United States offered in evidence the following portion of said paper so purporting to be a copy of the Chicago Dispatch for July 27th, 1895:

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY—12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

—AND—

Official Paper of Cook County.

Dispatch Building, 115–117 Fifth Avenue

TELEPHONES:

Business Offices 3495
Editorial Department 3494

TERMS OF SUBSCRIPTIONS:

By mail, postage paid, one year $3.50
By mail, postage paid, six months..... 2.00
By mail, postage paid, three months..... 1.25
(Mail subscriptions strictly in advance)

THE DISPATCH,
115–117 Fifth Avenue, Chicago, Ill.

NEW YORK OFFICE.
41 Times Building.....R. A. Craig, Manager.

TWELVE PAGES

SATURDAY, JULY 27, 1895.

To the admission of such portion of said paper so purporting to be a copy of the Chicago Dispatch for July 27th, 1895, the defendant, by his counsel, then and there duly objected on the ground that nothing contained therein tends to show who the publisher of the Chicago Dispatch was on said July 27th, 1895; and, further, that there is no proof that said paper is a copy of the Chicago Dispatch.

Objection overruled.

To which ruling in so overruling the objection of the defendant's counsel the defendant, by his counsel, then and there duly excepted.

69 Thereupon the counsel for the United States offered in evidence the following portion of said paper so purporting to be a copy of the Chicago Dispatch for August 10th, 1895:

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY—12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

AND

Official Paper of Cook County.

Dispatch Building, 115–117 Fifth Avenue

TELEPHONES:

Business Offices 3495
Editorial Department . . . 3494

TERMS OF SUBSCRIPTIONS:

By mail, postage paid, one year $3.50
By mail, postage paid, six months..... $2.00
By mail, postage paid, three months..... $1.25
(Mail subscriptions strictly in advance.)

THE DISPATCH,
115–117 Fifth Avenue, Chicago, Ill.

NEW YORK OFFICE.

41 Times Building..... .....R. A. Craig, Manager.

TWELVE PAGES

SATURDAY, AUGUST 10, 1895.

To the admission of such portion of said paper so purporting to be a copy of the Chicago Dispatch for August 10th, 1895, the defendant, by his counsel, then and there duly objected on the ground that nothing contained therein tends to show who the publisher of the Chicago Dispatch was on said August 10th, 1895; and, further, that there is no proof that said paper is a copy of the Chicago Dispatch.

Objection overruled; to which ruling in so overruling the objection of the defendant's counsel the defendant, by his counsel, then and there duly excepted.

70 Thereupon the counsel for the United States offered in evidence the following portion of said paper so purporting to be a copy of the Chicago Dispatch for September 14th, 1895:

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY—12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

—AND—

Official Paper of Cook County.

Dispatch Building, 115-117 Fifth Avenue

TELEPHONES:

Business Offices 3495
Editorial Department . . . 3494

TERMS OF SUBSCRIPTIONS:

By mail, postage paid, one year..... $3.00
By mail, postage paid, six months..... 1.50
By mail, postage paid, three months..... .75
By mail, postage paid, one month..... .25
(Mail subscriptions strictly in advance.)

THE DISPATCH,
115-117 Fifth Avenue, Chicago, Ill.

NEW YORK OFFICE.

41 Times Building.....R. A. Craig, Manager.

TWELVE PAGES

SATURDAY, SEPTEMBER 14, 1895.

To the admission of such portion of said paper so purporting to be a copy of the Chicago Dispatch for September 14th, 1895, the defendant, by his counsel, then and there duly objected on the ground that there is nothing contained therein tending to show who the publisher of the Chicago Dispatch was on said September 14th, 1895; and, further, that there is no proof that said paper is a copy of the Chicago Dispatch.

Objection overruled; to which ruling in so overruling the objection of the defendant's counsel the defendant, by his counsel, then and there duly excepted.

71 Thereupon the counsel for the United States offered in evidence the following portion of said paper so purporting to be a copy of the Chicago Dispatch for October 19th, 1895:

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY—12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

—AND—

Official Paper of Cook County.

Dispatch Building, 115–117 Fifth Avenue

TELEPHONES:

Business Offices 3495
Editorial Department 3494

TERMS OF SUBSCRIPTIONS:

By mail, postage paid, one year $8.00
By mail, postage paid, six months..... 1.50
By mail, postage paid, three months..... .75
By mail, postage paid, one month..... .25
(Mail subscriptions strictly in advance.)

THE DISPATCH,
115-117 Fifth Avenue, Chicago, Ill.

NEW YORK OFFICE.

41 Times Building.....R. A. Craig, Manager.

TWELVE PAGES

SATURDAY, OCTOBER 19, 1895.

To the admission of such portion of said paper so purporting to be a copy of the Chicago Dispatch for October 19th, 1895, the defendant, by his counsel, then and there duly objected on the ground that nothing contained therein tends to show who the publisher of the Chicago Dispatch was on said October 19th, 1895; and, further, that there is no proof that said paper is a copy of the Chicago Dispatch.

Objection overruled; to which ruling in so overruling the objection of the defendant's counsel the defendant, by his counsel, then and there duly excepted.

72 Witness McAFEE (continuing):

I (said Robert McAfee) received by mail a copy of the Dispatch just referred to of July 6th, 1895, and a copy of the Dispatch just referred to of July 27th, 1895, and a copy of the Dispatch just referred to of September 14th, 1895, and a copy of the Dispatch just

referred to of August 10th, 1895. I received them in my box in the post-office at St. Louis, Missouri.

On June 12th, 1895, I addressed a letter to the Dispatch, of Chicago, and enclosed therein the sum of $1.25; which said letter reads as follows:

ST. LOUIS, MO., *June 12th*, 1895.

The Dispatch, Chicago, Illinois:

Send Dispatch to R. M. Williams, box 801, St. Louis, Missouri, for three months from date; $1.25 enclosed.

Yours truly, R. M. WILLIAMS.

After sending the letter which I have just read I received the paper regularly, under the name of R. M. Williams, through the United States mail. The paper was delivered to me regularly in my box in the St. Louis post-office, 801. Each of the four issues of the Chicago Dispatch that I have just named, namely, the Chicago Dispatch for July 6th, 1895; for July 27th, 1895; for August
73 10th, 1895; for September 14th, 1895, was, each and every one of them, received by me and at that place. I cannot give you the exact date I received those papers, because I am away from the office sometimes for a week. When I would get back to St. Louis they would be in my mail. They don't carry any postal mark on their back.

Thereupon the copy of the paper purporting to be a copy of the Chicago Dispatch for July 6th, 1895, was marked Government Exhibit 2.

Thereupon the copy of the paper purporting to be a copy of the Chicago Dispatch for July 27th, 1895, was marked Government Exhibit 3.

Thereupon the copy of the paper purporting to be a copy of the Chicago Dispatch for August 10th, 1895, was marked Government Exhibit 4.

Thereupon the copy of the paper purporting to be a copy of the Chicago Dispatch for September 14th, 1895, was marked Government Exhibit 5.

Cross-examination:

I should have to refer to my diary to know whether I was in St. Louis July 6th, 1895. I was in St. Louis several times in July, 1895. I cannot name the dates. I do not stop at a hotel when I am in St. Louis. I do not register at a certain place when I am there. I do not know of any register that will show the day or days that I was in St. Louis in August, 1895. Very rarely I stop
74 at the Terminal hotel. If I were in St. Louis in July, 1895, I stopped at my office and slept at my home in Collinsville, Illinois. I don't think I spent a night in St. Louis in July, 1895. I don't think the Terminal hotel was open in July, 1895. I have not stayed in St. Louis over night but twice within the last year. I ate several luncheons in the city of St. Louis in July, 1895, but I cannot tell you where I ate any one of them.

I co-operated with the chief post-office inspector at St. Louis. I did not cause the chief post-office inspector at St. Louis to send me the publication which has been introduced in evidence as of July 6th, 1895. It was not sent to me at Chicago. My recollection is that I sent the whole package up here myself when I got ready to report the case. I did not get them all at once. I had them piled in my desk. Originally the paper purporting to be the Chicago Dispatch for July 6th, 1895, which has been marked Government Exhibit 2, was received by me at the St. Louis post-office. I took that last-mentioned paper from my box in the inspector's office in St. Louis. I did not take it from my box in the post-office in St. Louis. My box in the post-office in St. Louis is not numbered. It is simply labeled with my name. It is a box where I receive all my mail. It is put there by a messenger from the inspector's office. The inspector's office is in the post-office building at St. Louis.

That is the only way that I received the paper which
75 purports to be the Chicago Dispatch of July 6th, 1895, from the mail. I only know that that paper came from the mail as I have explained, namely, that I found it in my private box in the inspector's office. That box in the post-office inspector's office is not a post-office box in the same sense as 801, is downstairs. It is simply a box where all our mail is deposited.

Mr. FORREST (counsel for the defendant Dunlop): I move to exclude this paper which purports to be a copy of the Chicago Dispatch for July 6th, 1895, and which has been marked Government Exhibit 2.

The COURT: I will take that under consideration.

(Witness MCAFEE continuing:)

These other papers, which are marked respectively Government Exhibit 3, Government Exhibit 4, and Government Exhibit 5, and which purport to be copies of the Chicago Dispatch, dated respectively July 27th, 1895, August 10th, 1895, and September 14th, 1895, were received by me at the St. Louis post-office in the same way that the other paper, which purports to be a copy of the Chicago Dispatch for July 6th, 1895, and which is marked Government Exhibit 2, was received by me.

These papers (referring to the papers marked respectively Govern-
ment Exhibit 2, Government Exhibit 3, Government Exhibit
76 4, and Government Exhibit 5) were put in my box in the post-office inspector's office by the messenger. I did not see the messenger put those papers there (referring to the four papers marked respectively Government Exhibit 2, Government Exhibit 3, Government Exhibit 4, Government Exhibit 5, purporting to be copies of the Chicago Dispatch, dated respectively July 6th, 1895, July 27th, 1895, August 10th, 1895, and September 14th, 1895).

Mr. FORREST (counsel for defendant Dunlop): If the court please, I also move to exclude from the consideration of the jury the papers which have been marked respectively Government Exhibit 3, Government Exhibit 4, and Government Exhibit 5.

(Witness ROBERT MCAFEE continues his testimony as follows:)

When Gen. Black put the question to me, "Did you receive those papers through the mail?" I thought I knew what he meant. I thought I answered that question candidly when I said that I got those papers through the mails. I did not say that I had received them through the mails personally. I simply said I received them by mail. I did not leave out the word "personally" from my answer so as to give the jury the impression that I did receive it personally. I never thought of the word "personally." That is why it was omitted from my answer.

77 My last conversation with Joseph R. Dunlop may have been four months prior to June, 1895, but I hardly think it was so long. I am unable to fix the exact date of that conversation, but I would not say positively that it was not as long prior to June, 1895, as January, 1895.

I am a post office inspector. My commission runs that way. I have never drawn any salary from the United States. As to whether I am employed by the Government, I say I am commissioned by the Government. I think there is an agreement somewhere that I am not to draw a salary from the Government. Besides being a Government post-office inspector, I am a commission agent of the Western Society for the Prevention of Vice. I am paid for my services by the society for the suppression of vice. I was the agent for that society before I became a post-office inspector.

ROBERT W. MCAFEE was recalled as a witness on behalf of prosecution, and, being further examined by the district attorney, testified as follows:

After mailing the letter above set forth to the Chicago Dispatch I subsequently received the Dispatch. I began to receive it a few days after the sending of that letter. Subsequently I received from the Chicago Dispatch the following letter:

78 "The Chicago Dispatch, by Joseph R. Dunlop. Herman J. Huiscamp, treasurer, 115–117 Fifth avenue, Chicago.

CHICAGO, *Sept. 15th*, 1895.

Mr. R. M. Williams, box 801, St. Louis, Mo.

DEAR SIR: Your subscription for the Dispatch expires August 13th, 1895. Kindly advise if you wish the paper continued, and oblige,

Very truly yours, JOSEPH R. DUNLOP.
E.

The letter addressed to R. M. Williams last read was enclosed in an envelope, which said envelope was addressed Mr. R. M. Williams, box 801, St. Louis, Missouri. Said envelope contained thereon the Chicago and St. Louis post-marks and a two-cent postage stamp.

Q. Mr. McAfee, I ask you to recall your testimony of yesterday as to how you received the papers that we have mentioned (referring to the papers which purported to be copies of the Chicago Dispatch,

dated respectively July 6th, 1895, July 27th, 1895, August
79 10th, 1895, and September 14th, 1895).

Objected to by counsel for defendant.

Q. You there designated the man who placed those papers in your box as a messenger. I will ask you, first of all, in what office this box was located?

The COURT: Your box?

Mr. FORREST (counsel for defendant): I object. That matter has been exhausted, and Mr. McAfee testified that he was not present when the messenger took the papers there (referring to the papers which purported to be copies of the Chicago Dispatch, dated respectively July 6th, 1895, July 27th, 1895, August 10th, 1895, and September 14th, 1895, and marked respectively Government Exhibit 2, Government Exhibit 3, Government Exhibit 4, and Government Exhibit 5).

The COURT: I understood him to say yesterday that his office is in the inspector's office.

The WITNESS: It is in the inspector's office, in the post-office building.

Q. What was this messenger who delivered these papers?

Objected to by counsel for defendant.

The COURT: That was covered yesterday, General.

Mr. BLACK: The witness may have left the impression in the minds of the jury that this man was a private messenger of
80 his. I want to show by the witness that this man that he called a messenger was an officer on the pay-rolls in the employ of the Government, and that it was his business to deliver that mail to the inspector's office, and that it was a part of the regular Post-office Department.

Mr. FORREST (counsel for defendant): The testimony already shows that this man does not know who put the papers in his box except from hearsay and rumor. He was not present when it was done.

The COURT:

Q. He was not a letter-carrier, was he?

A. How is that?

Q. Was he a letter-carrier?

A. So far as our office is concerned, yes, sir.

Q. Was he a letter-carrier?

A. Not a regular letter-carrier; no, sir. We did not get our mail that way.

Q. He was a messenger to your office for the purpose of bringing papers from the post-office to your office?

A. For gathering mail for the inspectors and distributing it in a box provided in the post-office.

Mr. FORREST (counsel for defendant): If the court please, the wit-

ness said yesterday that he did not see him put the papers in that box. He does not know who put the papers in that box.

The COURT:

Q. Didn't you say yesterday, Mr. McAfee, that with relation to these papers—I mean the papers dated the 6th of July, the
81 27th of July, the 10th of August, the 14th of September, and the 19th of October—you were not personally present when the messenger put them in your box?

A. I don't think I was; no, sir.

The COURT: I do not see how it helps your case, General. How does this man know the messenger put it in?

Mr. JOHN C. BLACK (United States district attorney): I propose to prove that this was the universal custom and the duty of this messenger.

Mr. W. S. FORREST (counsel for defendant): That will not do in a criminal case, if the court please.

Mr. JOHN C. BLACK (United States district attorney): I think it will, in a case of this kind, do to prove a transaction that occurs as constantly and regularly as the rising of the sun. What I am seeking to establish is that the man called by the witness a messenger was really an officer of the post-office, in the employ of the Government, in the pay of the Government, and that his business was to take the mail from the general delivery and put it in the inspector's office.

Mr. FORREST: I object. The witness does not know that he put the papers in that box. The witness was not there. He has just answered to the court that he did not know who put them there.

The COURT: I will permit you to show what the duty of the messenger was.

82 To which ruling of the court the defendant, by his counsel, then and there duly excepted.

The COURT:

Q. What were the duties of this man whom you call a messenger?

A. His title is really chief clerk.

Q. Chief clerk of the inspector's office?

A. Of the inspector's office; and then another clerk whose business it is to go to the box department and gather all the mails for the inspectors and bring it to the inspector's office and distribute it there, as the box clerks do down below.

Q. He don't carry mail for the public at all?

A. No, sir.

Q. He only carries mail for the accommodation of the inspectors and officers of the post-office?

A. It is his duty as an officer to bring the mail up into the office and put it into the box provided by the Government for each inspector's mail.

The COURT: That presents a very nice question of law, as to

whether that is in the mail when the inspector has it or is not in the mail. The mail is for the public. You have got that fact now. I will pass on that later.

Mr. FORREST (counsel for defendant): I move to exclude from the record and the consideration of the jury what the witness McAfee has just testified to with reference to the duty of the man that he supposes put those newspapers in the box (referring to the
83 newspapers marked respectively Government Exhibit 2, Government Exhibit 3, Government Exhibit 4, and Government Exhibit 5) on the ground that the witness McAfee has repeatedly stated that he did not see the man put those papers in that box; so that we are following a presumption upon a presumption. It looks to me like an inference from an inference.

The motion was overruled by the court. To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. JOHN C. BLACK:

Q. How long has this duty been so performed and how frequently by this messenger?

Objection by counsel for defendant. Objection overruled. To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. It has been the duty of the men occupying these positions ever since the office as been established.

I don't remember when the office was established, but it has been eight or ten years, I think. These duties were performed by that messenger several times every day.

Cross-examination:

I should have to consult my diary to tell how many times I was in St. Louis in the year 1895. I presume I was in St. Louis on an average of two days a week during the year 1895. I don't
84 know the name of the man who put the papers in my box in the post-office. I said there were two clerks who had that business. I think their names are Mr. Reed and Mr. Allen. I don't know who the messenger was July 6th, 1895. I did not see anybody put the paper in the box dated July 6th, 1895. I don't know who did it. I know he was a white man. We had no black man in that office, to my knowledge. I don't know who put the papers in that box in the post-office inspector's office. I can only say, by way of explanation, that that is the way I had gotten all my mail for ten years. I have seen those clerks bring the mail and distribute it there. I never saw anybody deposit in my box in the post-office inspector's office in St. Louis the papers dated July 27th, 1895, August 10th, 1895, September 14th, 1895, and marked respectively Government Exhibit 3, Government Exhibit 4, and Government Exhibit 5.

I don't know how many times I have given testimony in criminal cases. I don't think I have testified a thousand times, yet I would

not say that I have not. It has been part of my duty to testify in criminal cases about eighteen years. I have had a great deal of experience in working up evidence in criminal cases. I think I have a very fair knowledge as to what is necessary to do in order to get in evidence.

85 WASHINGTON HESING, being duly sworn on behalf of the Government, testified as follows:

For a period of more than the two years last past I have been the postmaster in the city of Chicago. I am the publisher of the Staats Zeitung. I don't know who is the publisher of the Chicago Dispatch. I don't know that I have talked with Joseph R. Dunlop about the publication of the Dispatch. I have talked to Joseph R. Dunlop a great many times about newspaper business and one thing or another. I have known Joseph R. Dunlop for a great many years. I have talked with him about a great many things, believing that he was the proprietor and publisher of the Dispatch. Some of these conversations took place in the Dispatch office. I talked to Joseph R. Dunlop there, as I have talked to almost every newspaper proprietor in Chicago, but he never specifically informed me that he was the publisher, and I never asked him. I recollect calling on Joseph R. Dunlop in the office of the Dispatch. He had his hat off; was seated at the desk, and, as far as I could see, from his actions he was at home there. The office of the Chicago Dispatch is 115–117 Fifth avenue. The Dispatch has been in that building, as far as I know, the last two or three years past. I have seen Joseph R. Dunlop in the office there several times dur-
86 ing the past two or three years. I won't say whether it was three times or six times. I never asked Mr. Dunlop whether he was the publisher of the Dispatch. He never volunteered that statement; he never volunteered a statement to me whether he was or was not the publisher. I have nev-r seen anything in writing or in print to convince me positively that he was the publisher. I saw his paper every day. I saw his name at the head of the editorial column. I never had any conversation with Mr. Joseph R. Dunlop with reference to sending the Chicago Dispatch through the mail. I know of no other Joseph R. Dunlop connected with the newspaper business than the defendant here on trial.

I had a conversation with Joseph R. Dunlop in my office in which he said: "I was just in the building. I have just given bail, with Mr. Washburn and Mr. Siegel on my bond. There is nothing in it. It don't amount to anything."

There was nothing in his conversation to indicate what case he had given bail in.

I do not recollect asking Joseph R. Dunlop substantially this: "Why don't you change the character of your paper?" or "Why don't you keep those advertisements out?"

87 JOHN A. MONTGOMERY, being duly sworn on behalf of the Government, testified as follows:

I have lived in Chicago the 36 years last past. I am now and have been superintendent of the mails at the Chicago post-office during six years last past. I have charge of the receipt and dispatch of all the mails in and out of the Chicago post-office, the classification of matter and what is known as the second-class matter, and also the foreign mails. I am familiar with the fact that there is such a publication passing through the Chicago post-office as the Chicago Dispatch.

Motion by defendant to exclude the last sentence. Motion overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Q. How long has that publication been passing through the post-office?

Objected to by defendant's counsel. Objection overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. Well, I can't answer that question accurately, but I should say during the past three or four years.

88 I have seen the paper which I now hold in my hand (said paper purporting to be a copy of the Chicago Dispatch, dated July 6th, 1895, and to be the five-o'clock edition thereof, which said paper is marked Government Exhibit 6). I received that particular paper between five and six o'clock, in the Chicago post-office, on the 6th day of July, 1895. I put the following upon it in writing at the time I received it:

Rec'd by mail July 6, '95. J. A. Montgomery.

Q. How did you receive it?

A. I received it from what is known as the round-table, the place at which the mail comes into the office from the platform, where it is received direct from the publication office.

Motion by defendant's counsel to exclude from the last answer made by the witness the following: "Where it is received direct from the publication office."

Motion overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Q. State whether or not that was delivered to you through the United States mail.

Objected to by defendant's counsel on the ground that the question is leading.

Q. State how it was delivered to you.

89 A. It was delivered to me through the regular channels of the mails, in the same manner that all other papers of this kind are delivered.

I received them between five and six o'clock, July 6, 1895. It was

possibly before five o'clock when I received this paper and when said writing was put on there.

(Thereupon another paper, which purported to be a copy of the Chicago Dispatch for Saturday evening, September 14, 1895, was placed in the hands of the witness. Said last-mentioned paper is Government Exhibit 7.)

That paper (referring to paper marked Government Exhibit 7) was delivered to me, by the usual and ordinary channels of the United States mails, September 14, 1895.

It came to me from the round-table, at which the mails are regularly delivered to the Chicago post-office.

This paper also (referring to Government Exhibit 8) was delivered to me, through the regular channels of the mail, from the round-table in the post-office.

(Thereupon a paper purporting to be a copy of the Chicago Dispatch for Saturday evening, July 27th, 1895, was placed in the hands of the witness. Said paper is Government Exhibit .)

As to that paper (referring to the paper, Government Exhibit) I say that my regular copy of that paper (referring to the Chicago Dispatch) had been taken by some one and I wanted another one, and I went to another clerk in the office and got a copy from him, and the copy I got from him is that paper (referring to Gov-
90 ernment Exhibit), and upon that last-mentioned paper I made this notation: "Some one took my paper, so I got a copy. Received by mail July 27th, 1895." I received that paper (referring to the paper marked Government Exhibit) in the office that immediately adjoined my office, near the round-table, in this city, county, and State, in the same way that I have already testified with reference to the other papers.

I received no other copy of the Dispatch, except a copy which was marked on the label "Mr. Montgomery." I received all of the morning and evening papers in this way, with my name on them.

Motion to exclude the following statement by the witness: "I received all of the morning and evening papers in this way regularly sent to me with my name on them."

Motion overruled; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

All of the papers that I have identified I received between five and six o'clock in the evening of the day on which they are dated. The papers which I have identified I received in my office in this city—in the Chicago post-office. The papers that I have identified I placed in the bottom of my copying-press stand and put on those papers the writing that is on them. I turned the papers
91 I have identified over to Mr. McAfee within the past two months.

I have been acquainted with Joseph R. Dunlop for many years. I have conversed with Mr. Dunlop with regard to his proprietor-

ship of the Chicago Dispatch within the past year. In that conversation I said, "Mr. Dunlop, if I were you I would not publish that kind of a paper." Mr. Dunlop replied, "Mr. Montgomery, no other paper has made the success this one has, and it is only by this means that it has been possible to build the paper up in the short time that I have built it up." I then referred to the fact that even the publication of the lottery advertisements that appear in the copies of the newspaper that do not pass through the mail would certainly give him trouble some time, because I said that no matter how well conducted an office was, where one had to depend upon the employés there was a liability, at least, of the employés making a mistake and putting those papers which contain the lottery advertisements into the mail in the post-office. Mr. Dunlop said that that was true, but that his business was so managed that he did not think it was liable that such an accident would occur. I said to Mr. Dunlop in that conversation, "If you are not careful these lottery ads. that you are publishing in your paper and that you don't send through the mails and that you don't intend shall be put in the mails will by accident get there, and if they do it will go
92 very hard with you. It will give you a great deal of trouble. No matter how well-organized the business is, so long as you have to depend upon human agencies you will have the imperfections that come from humanity, and some of your clerks will make the mistake of putting the lottery advertisements into the post-office, and when they do it will give you a great deal of trouble."

Mr. Dunlop had come to the post-office because of a certain irregularity that had occurred in the mail. Certain copies of the Chicago Dispatch containing lottery advertisements had gotten into the mail by mistake and Mr. Dunlop had come to see me about that mistake. I had no later conversation with Mr. Dunlop. I have had business communications with him almost daily. These communications were statements of postage due on the Chicago Dispatch. These statements are prepared by clerks in my office, and they are sent to Mr. Dunlop by clerks in my office, under the name of the postmaster. These statements are prepared under my supervision.

Q. Was the publication called the Chicago Dispatch passing regularly through the mails for the six months preceding the months of July, August, September, or October of last year?

Objection by counsel for defendant. Objection overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

93 A. Yes, regularly. The paper that does not go regularly is suspended at once.

Q. How is the mail received at the Chicago post-office, by whom is it received, and how is it distributed and put into the mail?

Objection by defendant's counsel. The objection overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. The mails are received from all the afternoon publications at the Jackson-street front of the Chicago post-office. They are, as a rule, received by a man by the name of Morse. That is where the majority of the second-class mail is received. After the mail is received there it is weighed, taken to what we term the round-table—a large round table—around which round-table hangs pouches and sacks. There the sacks are opened which contain the papers, and the papers are distributed from that table into the pouches and sacks. Then the pouches are sealed up and sent out on the various trains to whatever destination the publisher has indicated. The mail is weighed after it leaves the platform on which it is received and before it is carried to the round-table. During the past two years second-class mail has not been received in the Chicago
94 post-office in any other way. That has been our unvarying custom for the last three years.

Q. Have you so received the Chicago Dispatch during all that time?

Objection by defendant's counsel. Objection overruled; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. Yes, sir. When a number of papers are sent to a single city they are done up invariably in what we call a club package. All of the papers going to a town are frequently put by the publisher in one parcel and around the whole is a wrapper with the address of the place on the outside. When that package reaches its destination the wrapper is burst and the papers are distributed to their several addresses.

Cross-examination:

The copies of the Chicago Dispatch have been going through the mail during the past three or four years—some uncovered and some wholly uncovered. The only covers about the copies of the Chicago Dispatch that have been going through the post-office are the single wrappers on the covers of what are called club packages. The covers or the wrappers were put about copies of the Chicago Dispatch so that we could remove those covers or wrappers
95 without mutilating the package, and we could very easily take the papers out from these packages. There has been no attempt, as far as I know, to conceal from the post-office authorities the contents of the copies of the Chicago Dispatch that passed through the Chicago post-office.

I detained the copies of the Chicago Dispatch that contained therein advertisements of lottery, under the instructions of the Post Office Department. These instructions are that first and second class, among other things these newspapers which contained lottery advertisements, are forbidden to be published and sent through the mails. I did not have power from the Post-office Department to detain any publication which contains matter which is prohibited by law to be sent through the mails. We are not supposed to pass upon such matters as executive officers. Such matters must be re-

ported and referred for action to the courts and legal officers of the department. We had no right on our own authority to assume that any publication was obscene. That is something for the courts or higher officials to decide. If the matter in any newspaper in the mail was manifestly obscene, we had the power to detain such a paper and prevent it from going through the mail; but in doubtful cases we had no such authority. The facts are that the postal officials have learned by reason of instructions and also by the action of the courts in regard to the rights of the press that
96 we are not to interfere on a mere suspicion that we individually believe a thing to be wrong. We are to give the press the largest possible liberty. In the case of any publication that was not to my mind clearly obscene, but as to whether it was obscene was of a doubtful character, the officer would have to allow it to pass, and, if the officer was so inclined, to report the facts to the postmaster. His report would have reference to the character of the publication. He should make that report to the postmaster with reasonable diligence.

I said that I had been receiving copies of the Dispatch in the mails for a long while and in a general way I knew the contents of the copies of the Dispatch; and I told Mr. Dunlop that he ought not to publish such a paper as that. I called the attention of Postmaster Hesing and Postmaster Sexton to the character of the Chicago Dispatch. I did not report the matter to the Post-office Department at Washington, because I am not permitted so to do. I called Postmaster Sexton's attention to the Chicago Dispatch soon after it was entered in the post-office as second-class matter. I frequently called Postmaster Hesing's attention to the character of the Dispatch. With him it has been a matter of common talk. I cannot state when I first called his attention to it. I should say within the last fifteen months. I have no knowledge that Post-
97 master Hesing took any action with reference to my complaint respecting the Chicago Dispatch. I received a verbal reply from Postmaster Hesing with reference to my complaint to him. The reply from Postmaster Hesing was that the papers should certainly be excluded from the mails because of its indecency. I did not exclude the paper from the mails after hearing Postmaster Hesing's statement, because I was not ordered to do so. The matter was in his hands entirely. I had no authority to exclude that paper without his authority. He said it should have been done, but he did not order me to — it. I did not ask him for an order to do it. That would not be courteous. Postmaster Hesing merely expressed his opinion. I understood from what he said that I would not be justified in stopping that paper without some positive action on his part; but I did not tell him that.

I received the paper which purports to be the Chicago Dispatch for July 6th, 1895 (and which is marked Government Exhibit 6), between five and six o'clock on the evening of July 6th, 1895. I received that paper (referring to the paper purporting to be a copy of the Chicago Dispatch for July 6th, 1895, and marked Government Exhibit 6) at my desk in the post-office. My desk is in room

No. 1, on the west side of the post-office building. The round-table is not in my office. The round-table is in a room which is nearly the center of the post-office building, at the south end. There
98 are five partitions between my room wherein I received all the copies of the Chicago Dispatch that I did receive and about which I have given testimony and the room which contains the round-table that I have already described in my testimony. All the copies of the Chicago Dispatch that I received I received in my room. I received it (referring to the paper purporting to be a copy of the Chicago Dispatch for July 6th, 1895, and marked Government Exhibit 6) from one of the employees at the round-table or the messenger at my office. I know that I received that paper from one of the employees at the round-table or the messenger of my office because I saw him bring the paper. He got that paper presumably at the round-table. I know that. I know he could not get it at any other place. I did not see him get it there. He did not need to tell me that he got it there. I received that paper in my office in the post-office building, and my office is separate from the room which contains the round-table by five doors. I swear positively that this paper (referring to Government Exhibit 6) came from that round-table. I know that because it is usual—the custom and the habit. What I mean is this: that I received that paper (referring to Government Exhibit 6) from an employee of the post-office, and in accordance with the usual custom in the post-office said paper would have to come from that round-
99 table. I don't know that I saw it on the round-table. I remember receiving the identical paper marked Government Exhibit 6, because I have written on that paper this: "Received by mail July 6th, 1895. J. A. Montgomery."

I wrote that at the time I received the paper or within a few minutes afterwards. I don't know the name of the person that delivered it to me. All the other papers which I have identified and respecting which I have given testimony (namely, the papers marked respectively Government Exhibit 6, Government Exhibit 7, and Goverment Exhibit 8) I received in the same way I have testified that I received the paper marked Government Exhibit 6. That paper (referring to the paper marked Government Exhibit —) I took from Captain Beattie's table, between five and six o'clock on July 27th, 1895. Captain Beattie's room is the second room from mine to the north. Captain Beattie received this paper in the same manner in which I received mine. I know that because all of the papers must come from that source—that is, it is the custom to do that. Of my own knowledge, I don't know where Captain Beattie received this paper (referring to Government Exhibit —). I am positive that I received the papers that I have identified from the round-table by reason of the system which prevails, which makes it impossible for the papers to come to me through other sources.

100 Redirect examination by Mr. BLACK:

The reason given me by Postmaster Hesing why the Chicago Dispatch should be excluded from the mails was the character of

the advertisements that appeared in the Chicago Dispatch. I understood the expression used by Postmaster Hesing at the time he spoke to me not as an order, but merely as the expression of his opinion.

I have said that a messenger or some one connected with the post-office brought to my office from the round-table in the post-office building the papers which I have identified. My office is room 1. It is the first office to the south side of the Clark-street entrance. It is a part of the post-office. The person who brought these papers to my office is not known as a letter-carrier or as a mail-carrier. He is a man hired by the Government for doing that work and any other work that he is directed to do. Those papers were delivered to me in my office by two boys. The first name of one is Roy—I have forgotten his surname just at this moment—and the surname of the other one is Anderson, but the first name of Anderson I don't know. These are the names. I could not give you the names of these men. The man at the round-table delivered those papers to me part of the time. Sometimes those papers were delivered to me by one man and sometimes by another.

101 As a rule, however, they were delivered to me by the messenger. The duties of the messenger are to run errands and do things that are assigned to him. He is a general office boy. He is a regular employé of the post-office detailed as a messenger to my office.

Q. What are the duties of that messenger?

Objected to by counsel for defendant. Objection overruled; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. In a general way, his duty is to do anything we tell him to do, and he has certain fixed things to do that he does every day.

Q. Including this?

A. Yes, sir.

Recross-examination:

The duties of the messenger respecting which I have given testimony were defined by me and not by the Post-office Department.

Re-redirect examination:

I had a right to define them.

102 H. H. KOHLSAAT, being first duly sworn on behalf of the Government, testified as follows:

I am the publisher of the Times-Herald and Post, and have been a resident of this city since 1865. I am acquainted with Joseph R. Dunlop, the defendant, and had a conversation with him as to who is the publisher of the Dispatch in the month of April or May last. Mr. Dunlop called on me in reference to leasing the basement and the presses in the Post building. I then owned the Post building. Mr. Dunlop called on me in relation to leasing the basement for the

publication of the Dispatch. Mr. Dunlop in that conversation asked me if I would lease the basement to him, and I told him that I had not decided what I would do with the building; that I was at that time negotiating with some parties.

THOMAS M. BEATTY, being first duly sworn on behalf of the Government, testified as follows:

I am cashier in collecting second-class postage in the Chicago post-office. I have been in the employ of the Chicago post-office thirty years and over. I have no personal acquaintance with the defendant, Joseph R. Dunlop. I don't know that I have ever met him.

Q. How many papers of the second class were published
103 in Chicago during the interval of time from October, 1892, to the present time, regularly?

Objected to by counsel for the defendant. Objection overruled; to which ruling the defendant, by his counsel, then and there duly excepted.

A. The number varies from time to time, but the number of live papers remains about the same. There are about 600 of all classes.

Motion to exclude the testimony given by the witness Beatty. Motion overruled; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

FRANCIS A. MORSE, being first duly sworn on behalf of the Government, testified as follows:

I am a clerk in the Chicago post-office and have been a clerk in the Chicago post-office continuously during the four years last past. I am employed in the mailing division as receiving clerk. I have been receiving clerk during the two years last past. In the performance of my duty I stand at the Jackson-street entrance to the post-office, on the outside and at the platform there. I was so engaged in the Chicago post-office during last summer. I was absent from my post of duty last summer from the 29th day of July
104 to the 14th day of August, but was present all the rest of the time, to the best of my recollection, except Sundays. I kept memoranda of the work that I did at my desk. I made such memoranda on the day that I received the stuff. I made the memorandum which I now hold in my hand, which is dated July 6, 1895, and is marked "Government Exhibit 9," on July 6, 1895.

I also made the memorandum which is dated July 27, 1895, and is marked "Government Exhibit 10," on July 27, 1895.

On September 14, 1895, I made the memorandum which is dated September 14, 1895, and which is marked "Government Exhibit 11."

On October 19, 1895, I made the memorandum which is dated October 19, 1895, and which is marked "Government Exhibit 12."

These memoranda it is and was my duty, under the post-office regulations, to make, as clerk in the Chicago post-office, in order to know who to charge for the postage of the newspapers. When the

mail is brought in we set down the number of pounds. These memoranda I take down to the weigh-room and give to the clerk in the weigh-room. I don't know what he does with them. I know I made all these memoranda accurately at the time.

Q. Have you any independent knowledge that the Dispatch was delivered to you during that period (referring to the period embraced by the month- of July, August, September, and October, 1895)?

Objected to by counsel for the defendant. Objection over-
105 ruled; to which ruling the defendant, by his counsel, then and there duly excepted.

A. Well, I know by the wagon that drove up—the cart marked "Chicago Dispatch" on it and unloaded there. If it happened to be unloaded when I was not there I would examine the bags and see "Chicago Dispatch," so as to charge it to the right parties.

Thereupon the memorandum marked "Government Exhibit 9" was offered in evidence on behalf of the Government. Counsel for the defendant then and there objected to the admission of said memorandum in evidence. Said objection was overruled and said memorandum so marked "Government Exhibit 9" was admitted in evidence; to which ruling the defendant, by his counsel, then and there duly excepted.

Said memorandum marked "Government Exhibit 9" is as follows:

GOVERNMENT EXHIBIT 9.

Post-office, Chicago, Ill.

Memorandum of Second-class Mail Weighed on Platform.

JULY 6TH, 1895.

Name of publication or firm.	No. of sacks.	Gross weight.	Tare.	Net weight.
Arbeiter Zeitung, 2.18	1	37		
Abendpost, 3.00	1	20		
Drovers' Journal, 4.20	50	984		
Daily News, 2.35	1	8		
" " 3.30	2	83		
Dispatch, 3.55	2	132		
Evening Journal, 2.12	1	6		
" " 3.35	2	128		
Evening Post, 3.20	1	24		
" " 4.10	4	148		
Der Republikaner, 2.10	0	6		
Freie Presse, 3.00	1	16		
Mail, 2.45	0	4		
Furniture Bulitin, 1.55	0	6		
Skandinaven				
Western News, 3.35	0	3		
E. S. Zeitung, 3.55	2	110		
Total				

F. A. MORSE, *Weigher.*

106 Thereupon the memorandum marked "Government Exhibit 10" was offered in evidence on behalf of the Government. Counsel for the defendant then and there objected to the admission of said memorandum in evidence. Said objection was overruled and said memorandum so marked "Government Exhibit 10" was admitted in evidence; to which ruling the defendant, by his counsel, then and there duly excepted.

Said memorandum marked "Government Exhibit 10" is as follows:

GOVERNMENT EXHIBIT 10.

Post-office, Chicago, Ill.

Memorandum of Second-class Mail Weighed on Platform.

JULY 27, 1895.

Name of publication or firm.	No. of sacks.	Gross weight.	Tare.	Net weight.
+ Arbeiter Zeitung, 2.35	1	38		
+ Abendpost, 2.35	1	18		
+ Drovers' Journal, 4.10	51	983		
+ Daily News, 2.20	1	8		
+ " " 3.35	2	84		
+ Dispatch, 3.50	2	150		
+ Evening Journal, 2.15	1	6		
+ " " 3.45	2	136		
+ Evening Post, 3.20	1	29		
+ " " 4.15	4	153		
+ Der Republikaner, 1.25	0	6		
+ Freie Presse, 3.16	1	16		
Mail				
+ Furniture Bul.	1	23		
Skandinaven				
+ Western News, 3.45	20	1,932		
+ E. S. Zeitung, 3.30	2	112		
Total				

F. A. MORSE, *Weigher.*

107 Thereupon the memorandum marked "Government Exhibit 11" was offered in evidence on behalf of the Government. Counsel for the defendant then and there objected to the admission of said memorandum in evidence. Said objection was overruled and said memorandum so marked "Government Exhibit 11" was admitted in evidence; to which ruling the defendant, by his counsel, then and there duly excepted.

Said memorandum marked "Government Exhibit 11" is as follows:

GOVERNMENT EXHIBIT 11.

Post-office, Chicago, Ill.

Memorandum of Second-class Mail Weighed on Platform.

SEPT. 14TH, 1895.

Name of publication or firm.	No. of sacks.	Gross weight.	Tare.	Net weight.
Arbeiter Zeitung, 2.47	1	38	1	
Abendpost, 2.42	1	17	1	
Drovers' Journal, 4.10	51	978	1	
Daily News, 2.20	1	8	1	
" " 3.35	2	87	1	
Dispatch, 4.00	2	141	1	
Evening Journal, 2.18	1	5	1	
" " 3.45	2	133	1	
Evening Post, 2.58	1	23	1	
" " 4.15	4	146	1	
Der Republikaner, 2.00	0	3	1	
Freie Presse, 3.12	1	15	1	
Mail				
Skandinaven				
Western News, 3.45	0	2	1	
E. S. Zeitung, 3.40	2	107	1	
Total				

F. A. MORSE, *Weigher.*

108 Thereupon the memorandum marked "Government Exhibit 12" was offered in evidence on behalf of the Government. Counsel for the defendant then and there objected to the admission of said memorandum in evidence. Said objection was overruled and said memorandum so marked "Government Exhibit 12" was admitted in evidence; to which ruling the defendant, by his counsel, then and there duly excepted.

Said memorandum marked "Government Exhibit 12" is as follows:

GOVERNMENT EXHIBIT 12.

Post-office, Chicago, Ill.

Memorandum of Second-class Mail Weighed on Platform.

OCT. 19TH, 1895.

Name of publication or firm.	No. of sacks.	Gross weight.	Tare.	Net weight.
Arbeiter Zeitung, 2.20	1	34		
Abendpost, 3.00	1	21		
Drovers' Journal, 4.40	51	990		
Daily News, 2.25	1	5		
" " 3.37	2	115		
Dispatch, 4.05	3	160		
Evening Journal, 2.20	1	6		
" " 3.50	2	137		
Evening Post, 3.15	1	20		
" " 4.15	4	145		
Der Republikaner				
Freie Presse, 2.50	1	15		
Press, 4.35	2	78		
Skandinaven				
Western News, 3.50	0	5		
E. S. Zeitung, 3.58	2	104		
Total				

F. A. MORSE, *Weigher.*

109 J. J. BURKE, being first duly sworn on behalf of the Government, testified as follows:

I have been employed in the Chicago post-office for several years last past. My occupation in the Chicago post-office is known as the dispatcher. My duties as such dispatcher are to give out the mail and vouchers and the taking of the mail to the wagon.

I had also laid upon me at one time the duty of receiving mail. When it was my duty to receive the mail I made the memorandum which I now hold in my hand, and which is marked "Government Exhibit 13," and which is dated August 10, 1895. The signature, J. J. Burke, to said memorandum is my signature. I put my signature on this memorandum on the 10th day of August, 1895. On the 10th day of August, 1895, I received the papers indicated on the line in that memorandum which is headed "Dispatch," at the platform of the post-office, from the wagon that brought it over; which said wagon had the name "Chicago Dispatch" on it.

Thereupon said memorandum dated August 10, 1895, which is marked "Government Exhibit 13," was offered in evidence on behalf of the Government. Thereupon the counsel for the defendant objected to the reception of said memorandum in evidence. Thereupon said objection was overruled by the court and said
110 memorandum so marked "Government Exhibit 13" was admitted in evidence. To said ruling of the court the defendant, by his counsel, then and there duly excepted.

Said memorandum was marked "Government Exhibit 13" and is as follows:

GOVERNMENT EXHIBIT 13.

Post-office, Chicago, Ill.

Memorandum of Second-class Mail Weighed on Platform.

AUGUST 10TH, 1895.

Name of publication or firm.	No. of sacks.	Gross weight.	Tare.	Net weight.
Arbeiter Zeitung, 2.15	1	42		
Abendpost, 2.40	1	23		
Drovers' Journal, 4.40	51	1,014		
Daily News, 2.20	1	5		
" " 3.35	2	88		
Dispatch, 4.00	2	138		
Evening Journal, 2.10	1	13		
" " 3.45	2	132		
Evening Post, 3.10	1	18		
" " 4.10	4	157		
Der Republikaner				
Freie Presse, 3.15	1	16		
Mail, 2.35	1	34		
Skandinaven				
Western News				
E. S. Zeitung, 3.50	2	111		
Total				

J. J. BURKE, *Weigher.*

111 WALTER C. HENRY, being first duly sworn on behalf of the Government, testified as follows:

I am record clerk in the Chicago post-office. I have been employed as record clerk five or six years. I made the memorandum that I now hold in my hand, which is dated July 6, 1895, and is marked "Government Exhibit 14." I also made the memorandum I now hold in my hand, which is dated September 14, 1895, and which is marked "Government Exhibit 15." I also made the memorandum that I now hold in my hand, which is dated October 19, 1895, and which is marked "Government Exhibit 16." As record clerk in the Chicago post-office, it was and is my duty to make a record of all the second-class mail received there. I do not weigh the mail, but I make a bill for the second-class mail which is received in the Chicago post-office.

The memorandum dated July 6, 1895, which is marked "Government Exhibit 14," I made on July 6, 1895.

The memorandum dated September 14, 1895, which is marked "Government Exhibit 15," I made September 14, 1895.

The memorandum which is dated October 19, 1895, which is marked "Government Exhibit 16," I made October 19, 1895.

These memoranda concern the Daily Chicago Dispatch. The data upon these memoranda, regarding which I have already given evi-

dence, I obtained from the weigher in the Chicago post-office.
112 The signature "Henry" to each of the said memoranda, respecting which I have given testimony, is my signature, made on the day on which the memoranda are severally dated.

Thereupon said memorandum marked "Government Exhibit 14" was offered in evidence on behalf of the Government. Thereupon counsel for the defendant objected to the reception of said memorandum in evidence. Thereupon said objection was overruled by the court and said memorandum so marked "Government Exhibit 14" was admitted in evidence; to which ruling the defendant, by his counsel, then and there duly excepted.

Said memorandum marked "Government Exhibit 14" is as follows:

GOVERNMENT EXHIBIT 14.

8. 11.

All receipts in this book must be accounted for. Return all defective sheets to auditor.

Memorandum Weight Receipt.

No. [K 57]* J 53249.

For superintendent.

Hour mailed: ——.

CHICAGO POST-OFFICE, *July* 6, 1895.

Received from Dispatch in weight as follows:

Number pounds	132
No. sacks, 2; tare	5
Net	
Amount of postage	$1 27

HENRY,
Weighing Clerk.

113 Thereupon said memorandum marked "Government Exhibit 15" was offered in evidence on behalf of the Government. Thereupon counsel for the defendant objected to the reception of said memorandum in evidence. Thereupon said objection was overruled by the court and said memorandum so marked "Government Exhibit 15" was admitted in evidence; to which ruling the defendant, by his counsel, then and there duly excepted.

Said memorandum marked "Government Exhibit 15" is as follows:

[*Letters and figures enclosed in brackets erased in copy.]

GOVERNMENT EXHIBIT 15.

16.

All receipts in this book must be accounted for. Return all defective sheets to auditor.

Memorandum Weight Receipt.

No. [K 57]* J 63999.

For superintendent.

Hour mailed: ——.

CHICAGO POST-OFFICE, *Sept.* 14 [1895],* 189[5].*

Received from Dispatch in weight as follows:

Number pounds	141
No. sacks, 2; tare	5
Net	
Amount of postage	$1 36

HENRY,
Weighing Clerk.

114 Thereupon said memorandum marked "Government Exhibit 16" was offered in evidence on behalf of the Government. Thereupon counsel for the defendant objected to the reception of said memorandum in evidence. Thereupon said objection was overruled by the court and said memorandum so marked "Government Exhibit 16" was admitted in evidence; to which ruling the defendant, by his counsel, then and there duly excepted.

Said memorandum marked "Government Exhibit 16" is as follows:

[*Letters and figures enclosed in brackets erased in copy.]

GOVERNMENT EXHIBIT 16.

21.

All receipts in this book must be accounted for. Return all defective sheets to auditor.

Memorandum Weight Receipt.

No. K 5713.

For superintendent.

Hour mailed: ——.

CHICAGO POST-OFFICE, *Oct.* 19, 1895 *189–*.

Received from Dispatch in weight as follows:

Number pounds	1 [60]* 32
No. sacks, 2; tare	[7]* 5
Net	
Amount of postage	$1 [53]* 27

HENRY,
Weighing Clerk.

115 T. OHLANDER, being first duly sworn on behalf of the Government, testified as follows:

During the year last past I have been distributor at the Chicago post-office. As distributor in the Chicago post-office, it is my duty to place the mail in the different sacks or pouches. We receive the mail at the round-table; then it is dispatched on the different railway trains. I know about the receipt during last year by the Chicago post-office of the paper called the Chicago Dispatch. I was on duty as mail distributor and receiver from July 1st, 1895, to October 31st, 1895.

Q. State whether or not on each and all of those days you received the paper called the Chicago Dispatch at the post-office.

Objected to by counsel for the defendant. Objection overruled; to which ruling the defendant, by his counsel, then and there duly excepted.

A. We did receive it—that is, we did receive it so far as I know. I put the answer that way for the reason that I should be notified if I had not received it.

The COURT:

Q. Do you now remember of having received the Dispatch at that place every day during that period?

*[Figures enclosed in brackets erased in copy.]

116 Objected to by counsel for the defendant. Objection overruled by the court; to which ruling the defendant, by his counsel, then and there duly excepted.

A. Yes; I may say I do.

Cross-examination:

I cannot tell whether I received the Chicago Dispatch on July 6, 1895, without consulting for it. I don't know whether I received a Dispatch at any time dated July 6, 1895. I don't know whether I at any time received the Dispatch dated July 27th, 1895. I make the same answer. I don't know that I received the Dispatch at any time dated August 10, 1895. I don't know that I received the Dispatch at any time dated September 14, 1895. I don't know that I at any time received a Dispatch dated October 19, 1895. What I know about this matter is that I usually received the Dispatch, and that is all I know about it.

Redirect examination:

We do receive it. What I mean is that we usually receive the Chicago Dispatch every day except Sunday. We do receive it.

WALTER S. MAYER, being first duly sworn on behalf of the Government, testified as follows:

117 I have resided in Chicago about two years. I am a post-office inspector. I have been a post-office inspector nearly five years, and have been on duty as such post-office inspector the past two years in the Chicago division. I know the defendant, Joseph R. Dunlop. I had a conversation with him in regard to the publication of the Chicago Dispatch in August, 1894, in Mr. Dunlop's office. Mr. Robert McAfee was present at that conversation. We first asked Mr. Dunlop who was the publisher, proprietor, and the responsible head of the Dispatch paper. He said he was. We then called his attention to a number of advertisements in the paper concerning "baths" and "massage" and "personal" items, and we discussed those items very freely; and he said some of them he did not know the text of. I read one especially and he said he did not know it was there, and as to the others he said he would let us understand that this advertiser was put in the paper by his direction through his advertising man, the man who was at the head of that department. He said he did not examine those advertisements in detail; that he traced it entirely to the head of that department.

Cross-examination:

We had copies of the Dispatch with us at the time of our conversation with Mr. Dunlop. They were copies of the Chicago Dispatch of about the date of the conversation. I am in the employ of the Government, am paid by the Government, and am not con-

118 nected with the Society for the Suppression of Vice. I cannot tell why I did not write to the Chicago Dispatch instead

of calling on Mr. Dunlop I do not usually do that. I cannot say that I called upon Mr. Dunlop to have a conversation with him because I knew I would have a great advantage in testifying orally as to what was said. There was no such understanding between Mr. McAfee and me at all.

W. R. CHAMBERLAIN, being first duly sworn on behalf of the Government, testified as follows:

I am an attorney-at-law and am a member of the Chicago bar. I have lived in this city twelve years. I know Joseph R. Dunlop, the defendant. I had a conversation with him in his office in the early part of December last, in the office of the Chicago Dispatch, on Fifth avenue, in this city. Mr. B. D. Marks was present at that interview. In that conversation the defendant, Joseph R. Dunlop, told me that he was the owner, the editor, and the proprietor of the Dispatch.

Thereupon the district attorney offered in evidence the paper marked "Government Exhibit 2," for the purpose of showing that it was deposited in the Chicago post-office for mailing, and for the purpose of showing that the matter therein contained was obscene, lewd, lascivious, and indecent.

119 Counsel for the defendant objected to the reception of said paper marked "Government Exhibit 2" in evidence on the following grounds:

First. The evidence fails to show that it was deposited in the Chicago post-office for mailing.

Second. The evidence fails to show that it was deposited or caused to be deposited in the Chicago post-office for mailing by the defendant, Joseph R. Dunlop.

Third. The evidence fails to show that it is a copy of the Chicago Dispatch, of which Chicago Dispatch the evidence tends to show that the defendant, Joseph R. Dunlop, is the editor or publisher or proprietor.

Fourth. The evidence fails to show that it is a copy of the paper described in any one of the counts of the indictment as the Chicago Dispatch.

Fifth. Said paper marked "Government Exhibit 2" is not the paper described in any one of the counts of the indictment upon which the defendant is now on trial, because said paper does not, under the headings "personal" and "baths," contain matter that is too long, or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of this court.

Sixth. There is a variance between "Government Exhibit 2" and the sixth count of the indictment, because "Government Exhibit

120 2" is not too long, or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of this court.

Seventh. Said "Government Exhibit 2" does not tend to support the allegation in count 6 of this indictment, because the columns

thereof headed "personal" and "baths" are not too long, or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of the court.

Which said objection was overruled by the court, and said paper marked "Government Exhibit 2" was admitted in evidence. To the ruling of the court in so overruling said objection the defendant, by his counsel, then and there duly excepted.

Said paper marked "Government Exhibit 2" is as follows:

(Here follows "Government Exhibit 2," marked p. 121.)

122 Which said Government Exhibit 2 is a fac-simile of what was published under the headings "personal" and "baths" on the eleventh page of a paper that purports to be a copy of the five-o'clock edition of the Chicago Dispatch, which was identified by the witness Robert W. McAfee and is dated July 6th, 1895.

123 Thereupon the district attorney offered in evidence the paper marked "Government Exhibit 3" for the purpose of showing that it was deposited in the Chicago post-office for mailing and for the purpose of showing that the matter therein contained was obscene, lewd, lascivious, and indecent.

Counsel for the defendant objected to the reception of said paper marked "Government Exhibit 3" in evidence on the following grounds:

First. The evidence fails to show that it was deposited in the Chicago post-office for mailing.

Second. The evidence fails to show that it was deposited or caused to be deposited in the Chicago post-office for mailing by the defendant, Joseph R. Dunlop.

Third. The evidence fails to show that it is a copy of the Chicago Dispatch, of which Chicago Dispatch the evidence tends to show tnat the defendant, Joseph R. Dunlop, is the editor or publisher or proprietor.

Fourth. The evidence fails to show that it is a copy of the paper described in any one of the counts of the indictment as the Chicago Dispatch.

Fifth. Said paper marked "Government Exhibit 3" is not the paper described in any one of the counts of the indictment upon which the defendant is now on trial, because said paper does

124 not, under the headings "personal" and "baths," contain matter that is too long, or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of this court.

Sixth. There is a variance between "Government Exhibit 3" and the twelfth count of the indictment, because "Government Exhibit 3" is not too long, or too obscene, or too lewd, or too lascivious, — too indecent to be set out in the indictment or spread upon the records of this court.

Seventh. Said "Government Exhibit 3" does not tend to support the allegation in count 12 of this indictment, because the columns thereof headed "personal" and "baths" are not too long, or too

obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of the court.

Which said objection was overruled by the court and said paper marked "Government Exhibit 3" was admitted in evidence; to which ruling of the court in so overruling said objection the defendant, by his counsel, then and there duly excepted.

Said paper marked "Government Exhibit 3" is as follows:

(Here follows "Government Exhibit 3," marked p. 125.)

126 Which said Government Exhibit 3 is a fac-simile of what was published under the headings "personal" and "baths" on the eleventh page of a paper that purports to be a copy of the five-o'clock edition of the Chicago Dispatch, which was identified by the witness Robert W. McAfee and is dated July 27, 1895.

127 Thereupon the district attorney offered in evidence the paper marked "Government Exhibit 4" for the purpose of showing that it was deposited in the Chicago post-office for mailing and for the purpose of showing that the matter therein contained was obscene, lewd, lascivious, and indecent.

Counsel for the defendant objected to the reception of said paper marked "Government Exhibit 4" in evidence on the following grounds:

First. The evidence fails to show that it was deposited in the Chicago post-office for mailing.

Second. The evidence fails to show that it was deposited or caused to be deposited in the Chicago post-office for mailing by the defendant, Joseph R. Dunlop.

Third. The evidence fails to show that it is a copy of the Chicago Dispatch, of which Chicago Dispatch the evidence tends to show that the defendant, Joseph R. Dunlop, is the editor or publisher or proprietor.

Fourth. The evidence fails to show that it is a copy of the paper described in any one of the counts of the indictment as the Chicago Dispatch.

Fifth. Said paper marked "Government Exhibit 4" is not the paper described in any one of the counts of the indictment upon which the defendant is now on trial, because said paper does not, under the headings "personal" and "baths," contain mat-

128 ter that is too long, or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of this court.

Sixth. There is a variance between "Government Exhibit 4" and the sixteenth count of the indictment, because "Government Exhibit 4" is not too long, or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of this court.

Seventh. Said "Government Exhibit 4" does not tend to support the allegation in count 16 of this indictment, because the columns thereof headed "personal" and "baths" are not too long,

or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of the court.

Which said objection was overruled by the court and said paper so marked "Government Exhibit 4" was admitted in evidence. To the ruling of the court in so overruling said objection the defendant, by his counsel, then and there duly excepted.

Said paper marked "Government Exhibit 4" is as follows:

(Here follows "Government Exhibit 4," marked p. 129.)

130 Which said Government Exhibit 4 is a fac-simile of what was published under the headings "personal" and "baths" on the eleventh page of a paper that purports to be a copy of the five-o'clock edition of the Chicago Dispatch, which was identified by the witness Robert W. McAfee and is dated August 10, 1895.

131 Thereupon the district attorney offered in evidence the paper marked "Government Exhibit 5" for the purpose of showing that it was deposited in the Chicago post-office for mailing and for the purpose of showing that the matter therein contained was obscene, lewd, lascivious, and indecent.

Counsel for the defendant objected to the reception of said paper marked "Government Exhibit 5" in evidence on the following grounds:

First. The evidence fails to show that it was deposited in the Chicago post-office for mailing.

Second. The evidence fails to show that it was deposited or caused to be deposited in the Chicago post-office for mailing by the defendant, Joseph R. Dunlop.

Third. The evidence fails to show that it is a copy of the Chicago Dispatch, of which Chicago Dispatch the evidence tends to show that the defendant, Joseph R. Dunlop, is the editor or publisher or proprietor.

Fourth. The evidence fails to show that it is a copy of the paper described in any one of the counts of the indictment as the Chicago Dispatch.

Fifth. Said paper marked "Government Exhibit 5" is not the paper described in any one of the counts of the indictment upon which the defendant is now on trial, because said paper does

132 not, under the headings "personal" and "baths," contain matter that is too long, or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of this court.

Sixth. There is a variance between Government Exhibit 5 and the twenty-sixth count of the indictment, because "Government Exhibit 5" is not too long, or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of this court.

Seventh. Said "Government Exhibit 5" does not tend to support the allegation in count 26 of this indictment, because the columns thereof headed "personal" and "baths" are not too long, or too ob-

scene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of the court.

Which said objection was overruled by the court and said paper marked "Government Exhibit 5" was admitted in evidence. To the ruling of the court in so overruling said objection the defendant, by his counsel, then and there duly excepted.

Said paper marked "Government Exhibit 5" is as follows:

(Here follows "Government Exhibit 5," marked p. 133.)

134 Which said Government Exhibit 5 is a fac-simile of what was published under the headings "personal" and "baths" on the eleventh page of a paper that purports to be a copy of the five-o'clock edition of the Chicago Dispatch, which was identified by the witness Robert W. McAfee and is dated September 14, 1895.

135 Thereupon the district attorney offered in evidence the paper marked "Government Exhibit 6" for the purpose of showing that it was deposited in the Chicago post-office for mailing and for the purpose of showing that the matter therein contained was obscene, lewd, lascivious, and indecent.

Counsel for the defendant objected to the reception of said paper marked "Government Exhibit 6" in evidence on the following grounds:

First. The evidence fails to show that it was deposited in the Chicago post-office for mailing.

Second. The evidence fails to show that it was deposited or caused to be deposited in the Chicago post-office for mailing by the defendant, Joseph R. Dunlop.

Third. The evidence fails to show that it is a copy of the Chicago Dispatch, of which Chicago Dispatch the evidence tends to show that the defendant, Joseph R. Dunlop, is the editor or publisher or proprietor.

Fourth. The evidence fails to show that it is a copy of the paper described in any one of the counts of the indictment as the Chicago Dispatch.

Fifth. Said paper marked "Government Exhibit 6" is not the paper described in any one of the counts of the indictment upon which the defendant is now on trial, because said paper does

136 not, under the headings "personal" and "baths," contain matter that is too long, or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of this court.

Sixth. There is a variance between "Government Exhibit 6" and the sixth count of the indictment, because "Government Exhibit 6" is not too long, or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of this court.

Seventh. Said "Government Exhibit 6" does not tend to support the allegation in count 6 of this indictment, because the columns thereof headed "personal" and "baths" are not too long, or

too obscene, or too lewd, or too lascivious, or too indecent, to be set out in the indictment or spread upon the records of this court.

Which said objection was overruled by the court and said paper marked "Government Exhibit 6" was admitted in evidence. To the ruling of the court in so overruling said objection the defendant, by his counsel, then and there duly excepted.

Said paper marked "Government Exhibit 6" is as follows:

(Here follows "Government Exhibit 6," marked p. 137.)

138 Which said Government Exhibit 6 is a fac-simile of what was published under the headings "personal" and "baths" on the eleventh page of a paper that purports to be a copy of the five-o'clock edition of the Chicago Dispatch, which was identified by the witness J. A. Montgomery and is dated July 6, 1895.

139 Thereupon the district attorney offered in evidence the paper marked "Government Exhibit 7" for the purpose of showing that it was deposited in the Chicago post-office for mailing and for the purpose of showing that the matter therein contained was obscene, lewd, lascivious, and indecent.

Counsel for the defendant objected to the reception of said paper marked "Government Exhibit 7" in evidence on the following grounds:

First. The evidence fails to show that it was deposited in the Chicago post-office for mailing.

Second. The evidence fails to show that it was deposited or caused to be deposited in the Chicago post-office for mailing by the defendant, Joseph R. Dunlop.

Third. The evidence fails to show that it is a copy of the Chicago Dispatch, of which Chicago Dispatch the evidence tends to show that the defendant, Joseph R. Dunlop, is the editor or publisher or proprietor.

Fourth. The evidence fails to show that it is a copy of the paper described in any one of the counts of the indictment as the Chicago Dispatch.

Fifth. Said paper marked "Government Exhibit 7" is not the paper described in any one of the counts of the indictment

140 upon which the defendant is now on trial, because said paper does not, under the headings "personal" and "baths," contain matter that is too long, or too lewd, or too obscene, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of this court.

Sixth. There is a variance between "Government Exhibit 7" and the twenty-sixth count of the indictment, because "Government Exhibit 7" is not too long, or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of this court.

Seventh. Said "Government Exhibit 7" does not tend to support the allegation in count 26 of this indictment, because the columns thereof headed "personal" and "baths" are not too long, or too

obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment *as* spread upon the records of the court.

Which said objection was overruled by the court and said paper marked "Government Exhibit 7" was admitted in evidence.

To the ruling of the court in so overruling said objection defendant, by his counsel, then and there duly excepted.

Said paper marked "Government Exhibit 7" is as follows:

(Here follows "Government Exhibit 7," marked p. 141.)

142 Which said Government Exhibit 7 is a fac-simile of what was published under the headings "personal" and "baths" on the eleventh page of a paper that purports to be a copy of the five-o'clock edition of the Chicago Dispatch, which was identified by the witness J. A. Montgomery, and is dated September 14, 1895.

143 Thereupon the district attorney offered in evidence the paper marked "Government Exhibit 8" for the purpose of showing that it was deposited in the Chicago post-office for mailing and for the purpose of showing that the matter therein contained was obscene, lewd, lascivious, and indecent.

Counsel for the defendant objected to the reception of said paper marked "Government Exhibit 8" in evidence on the following grounds:

First. The evidence fails to show that it was deposited in the Chicago post-office for mailing.

Second. The evidence fails to show that it was deposited or caused to be deposited in the Chicago post-office for mailing by the defendant, Joseph R. Dunlop.

Third. The evidence fails to show that it is a copy of the Chicago Dispatch, of which Chicago Dispatch the evidence tends to show that the defendant, Joseph R. Dunlop, is the editor or publisher.

Fourth. The evidence fails to show that it is a copy of the paper described in any one of the counts of the indictment as the Chicago Dispatch.

Fifth. Said paper marked "Government Exhibit 8" is not the paper described in any one of the counts of the indictment upon which the defendant is now on trial, because said paper does

144 not, under the headings "personal" and "baths," contain matter that is too long, or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of this court.

Sixth. There is a variance between "Government Exhibit 8" and the thirty-second count of the indictment, because "Government Exhibit 8" is not too long, or too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of this court.

Seventh. Said "Government Exhibit 8" does not tend to support the allegation in the count 32 of this indictment, because the columns thereof headed "personal" and "baths" are not too long, or

too obscene, or too lewd, or too lascivious, or too indecent to be set out in the indictment or spread upon the records of the court.

Which said objection was overruled by the court and said paper marked "Government Exhibit 8" was admitted in evidence.

To the ruling of the court in so overruling said objection the defendant, by his counsel, then and there duly excepted.

Said paper marked Government Exhibit 8 is as follows:

(Here follows Government Exhibit 8, marked p. 145.)

146 Which said Government Exhibit 8 is a fac-simile of what was published under the headings "personal" and "baths" on the eleventh page of a paper that purports to be a copy of the five-o'clock edition of the Chicago Dispatch, which was identified by the witness J. A. Montgomery and is dated October 19, 1895.

147 Thereupon all and several the Government exhibits in the foregoing bill of exceptions set forth were read to the jury by the district attorney.

Thereupon the Government rested its case.

Which said evidence was all the evidence heard by the court and jury upon the trial of the said above-entitled cause which tended to show the guilt of the defendant.

Thereupon the defendant, by his counsel, moved the court to instruct the jury to return a verdict of not guilty on the following grounds:

First. There is no evidence in the record tending to show that the defendant deposited or caused to be deposited in the Chicago post-office, for mailing, any one of -he documents admitted in evidence which purports to be a portion of a copy of the Chicago Dispatch.

Second. The evidence fails to show that all and several the documents admitted in evidence which purport to be portions of copies of the Chicago Dispatch are copies of the Chicago Dispatch.

Third. The evidence fails to show that any one of the documents admitted in evidence and which purports to be a portion of a copy of the Chicago Dispatch contained any matter in print that is obscene, lewd, lascivious, and indecent.

148 Finally, the evidence fails to show that the defendant, Joseph R. Dunlop, knew that any one of the documents admitted in evidence as papers which purport to be portions of copies of the Chicago Dispatch contained any matter that was obscene, lwed, lascivious, or indecent.

Thereupon the court denied the motion so made by counsel for the defendant to instruct the jury to find a verdict of not guilty. Thereupon the defendant, by his counsel, then and there duly excepted to the ruling of the court in so denying the aforesaid motion to instruct the jury to find a verdict of not guilty.

Be it further remembered that afterwards, in his argument to the jury, made after the evidence was closed and before the closing argument of defendant's counsel in the said case, Mr. J. C. Black,

the United States district attorney, spoke, among other things, as follows:

"There is not a single line or word of evidence in this case disputing the fact that Dunlop for two years last past has been the proprietor, the publisher, and manager of this paper."

To which counsel for the defendant then and there duly excepted.

Thereupon counsel for the defendant called the attention of the court to the language so used by the district attorney and notified the court of an objection and exception thereto, and the court replied, "Let the objection be overruled and an exception noted by the defendant."

149 And thereupon the said district attorney, in his argument to the jury, made after the evidence was closed and before the closing argument of defendant's counsel in the said case, speaking to the question whether the matter introduced was in fact lewd, lascivious, indecent, and obscene, spoke as follows:

"I do not believe that there are twelve men that could be gathered by the venire of this court within the confines of the State of Illinois, except where they were bought and perjured in advance, whose verdict I would not be willing to take upon the question of the indecency, the lewdness, lasciviousness, licentiousness, and wrong of those publications."

To which counsel for the defendant then and there duly excepted.

And thereupon counsel for the defendant called the attention of the court to the language used by the said district attorney and notified the court of an exception thereto, and the court then and there said:

"Let your exception be noted. I hardly think that last remark was proper. That is not an appeal to the evidence; it is an appeal to something outside of the evidence. Of course, there is nothing I can do with it except to say that it is improper, and I hope it won't be repeated."

Gen. BLACK: I withdraw the language.

And thereupon, in his argument to the jury, made after the evidence was closed and before the closing argument of defendant's counsel in the said case, the said United States district attorney spoke as follows:

150 "Now, gentlemen, it is not necessary for me to tell you what the massage treatment is—how a man is stripped naked from the sole of his feet to the crown of his head and rubbed with the hands"——

To which counsel for the defendant then and there duly excepted.

And thereupon counsel for the defendant called the attention of the court to the language used by the district attorney and notified the court of an exception thereto, and the court said:

"Well, I suppose massage, like walking, is so well known that everybody knows what it is. I don't suppose there would be any harm in the district attorney stating what walking is."

To which said language of the court the counsel for the defendant responded:

"Certainly not."

And thereupon the court said:

"Then I do not think there is any impropriety in the district attorney stating what the massage treatment is."

To which said ruling of the court the defendant, by his counsel, then and there duly excepted.

151 All and singular the remarks of the United States district attorney above set forth as remarks that were excepted to by the counsel for the defendant were made by said United States district attorney on the first day of February, A. D. 1896. On the third of February, A. D. 1896, said counsel for the defendant, in his closing argument to the jury, used the following language:

"The district attorney went so far as to tell you gentlemen he would believe you guilty of bribery if you did not return a verdict his way. Why, Black thinks this is Russia and that you are not American freeman, but Russian serfs, and that you can be frightened, intimidated, and dragooned into a verdict of guilty. I never knew anything like that to be attempted but once before, and that was when I had the honor to represent the Democratic committee in defending about 45 men indicted in this court after the election of 1884, when Mr. Tuthill was the prosecuting attorney. Politics ran high. Then as now we had an able, fearless, upright judge. The evidence was going hard against them in the particular case; cross-examination was showing perjury. A similar threat was made. The evidence was strong against the men, and although there was not on that jury anybody but Republicans they promptly returned a verdict of not guilty and said that they did it to rebuke such conduct in an American court."

152 Thereupon the court delivered the following charge:

The COURT: Gentlemen of the jury: For reasons perfectly satisfactory to myself, gentlemen, I have perhaps permitted a wider range to the discussion of counsel than I ordinarily do or ordinarily think ought to be permitted. Some of the argument of counsel was calculated to reach your emotions—to reach your feelings. Some of the argument of counsel on the other side was calculated to incense you somewhat against witnesses and against the Government.

It is now your duty, as it is mine, to recall yourself from that atmosphere—the atmosphere where your heart beats faster or your indignation is still aroused—back to the atmosphere of a court of justice, where pure intellect ought to preside and where you ought to look at the facts and the law with no other feeling than that simply of ascertaining what is the truth.

Every citizen on a jury is, of course, expected to serve his country not by the verdict he may find or the motives that may influence that verdict, but by the truth of the verdict.

I think I ought to say to you, too, because it has been brought somewhat into this cause, that whatever you may find to

153 be the truth or not the truth in respect to the charge against

this defendant ought not to be influenced by the punishment that might possibly follow that verdict. If you find the defendant not guilty, he goes about his rights and liberties as a citizen; if you find him guilty, your responsibility there ends. The balance of the responsibility is with the court.

There is this thing, too, that perhaps you ought to keep in mind as preliminary to this investigation. I quite agree with counsel that if these papers are of the character that the Government charges them to be—if they are obscene and lascivious and calculated to deprave the public morals—the Post-office Department ought to have ascertained that long ago, and the Post-office Department does not clean itself of responsibility by leaving that with the courts. It was a departmental matter as well as a judicial matter, and the Post-office ought to look carefully at the character of everything that is brought to it to ascertain if it is mailable under the provisions of the law or if it is unmailable; but, after all, that has nothing to do with the precise question before you. If you should find the defendant guilty, it might have much to do with the court in fixing the penalty; but if one department of the Government has failed to do its duty it does not excuse another department of the Government from doing its duty.

154 The charge in this cause is that the defendant knowingly caused to be deposited or himself deposited a publication in the mails which in itself was obscene, lewd, lascivious, and indecent. The question of fact for you to determine is whether he did that. Until the Government proves beyond a reasonable doubt that he knowingly caused to be deposited such a publication in the mails, the presumption of innocence stands between any penalty that the court might inflict, or any verdict that you might pronounce, and the defendant. That presumption of innocence is only overcome when these facts that I have named as the gist of the offense are, in your judgments, established beyond a reasonable doubt.

There ought to be no mistake, however, as to what a reasonable doubt is. We are not all without doubt on any subject. A reasonable doubt is not merely a doubt. It is a doubt for which you can give some reason. As an illustration, you may not be sure that the defendant is in court, not present at this moment. It is not impossible that some one else looking like him is now impersonating him, and yet there is no reason for the existence of such a supposition; so that a mere doubt unsupported by a reason respecting the existence of the facts that constitute the crime is not of itself sufficient to defeat conviction. It must be a doubt that you can give a reason for.

155 With that definition of a reasonable doubt, it is your duty, then, to look into all the evidence that is offered to ascertain if the charge has been made out beyond such a doubt.

In doing that, of course, you will only look at the evidence and at such facts and inferences as the evidence necessarily raises or reasonably raises. You will not rely upon anything that counsel has said to you as to what the evidence is, unless your own recol-

lection confirms that statement. You are the judges of what the evidence shows and you alone are responsible for that judgment.

Does the evidence, then, establish beyond a reasonable doubt that the defendant deposited or caused to be deposited in the post-office a copy of these papers which are said to contain the offensive and indecent matter? That raises two inquiries: First, were these papers ever deposited in the post-office? and, second, were they so deposited or caused to be deposited by the defendant? Were these papers ever in the post-office? That is a fact that, like any other fact, can be established either by direct testimony or by circumstantial testimony. That these particular papers read to you, the one said to have been received by McAfee and the ones said to have
156 been received by Montgomery, were ever in the post-office there is no direct testimony proving it—that is, there is no witness called who swears that he saw those particular papers in the post-office; so that you are required to look at all the circumstances to ascertain, then, if they were in the post-office.

The testimony of the Government tends to show that, with respect to the papers sent to Mr. McAfee, he, under the name of Williams, wrote to the Dispatch in this city, asking them to send him the paper for a specified time and enclosing the subscription price for that period; this letter was written from St. Louis; that after that time he contin-ed to receive the Dispatch. It was brought to his office by his messenger, supposedly from the post-office, though he himself personally does not know. I am now stating simply the effect of the testimony—the effect of what the Government's testimony tends to show. He also received from the Dispatch a letter acknowledging the receipt of the money.

So far as the Montgomery letters are concerned, the testimony of the Government tends to show that Mr. Montgomery, being an inspector of the Post-office Department——

Mr. BLACK: Superintendent.

The COURT: —superintendent of the Post-office Department, and having offices in the post-office building, received from time to time, in his office, from his messenger the copies of the Dispatch, some of which were introduced in evidence. He supposed
157 they came from the round-table, where the publications sent out by the afternoon papers were usually deposited, but he himself was not at the round-table and did not personally see the papers there.

Now, the testimony of the Government also tends to show that as a matter of fact the Dispatch during this period was delivered at the round-table for mailing purposes; that it was delivered there in considerable quantities and its weights taken by the weigher of the Post-office Department and reported to the clerk whose duty it was to record them.

So that you are at liberty to take all these facts together, consider them together, and if upon their consideration as a whole you have no reasonable doubt but what the Dispatch was deposited in the office, you are at liberty to find that it was so deposited, notwithstanding the fact that no witness saw it so deposited.

If, on the other hand, with all these facts in mind and giving to each its due credit in weighing the probabilities, if you can see some reasonable ground for believing or for doubting that these particular papers were deposited in the post-office, you must give to the defendant the benefit of that doubt. It is your duty to come to a conclusion upon all those facts and the effect of all those facts the same as you would conscientiously come to a conclusion upon any other set of facts that come before you in life.

158 There is no technical rule, there is no limitation in courts of justice, that prevents you from applying to them just the same rules of good common sense, subject always, of course, to a conscientious exercise of that common sense that you would apply to any other subject that came under your consideration and that demanded your judgment.

If, having done that, you have no reasonable doubt that these papers were deposited in the post-office, it is your duty to so find that fact; if you have, then, as I said before, given to the defendant the benefit of the doubt.

Of course, if you find that there is reasonable doubt that these papers were ever deposited in the post-office, why, that ends the case, and you need not to go into the other part of it; but if you are convinced that they were deposited in the post-office, then the next question for you to ascertain is, were they so deposited by the defendant or caused by him to be deposited?

That raises the question as to whether the defendant is the publisher of this paper or has such a connection with the paper that he must be held responsible as the publisher and deliverer of the paper. If the defendant holds such an office in the management of the Dispatch that whatever anybody else does with the Dispatch is under his guidance, with his assent, then he is responsible for that act just as much as if he had done it with his own hands; so you

159 must ascertain from the evidence whether he is the publisher and whether as such publisher he knew that the paper was going through the post-office.

The testimony of the Government on that branch of the case consists in alleged declarations by the defendant to different people that he was the publisher and responsible head of the Chicago Dispatch; some as early as August 30th, 1894, some as late as the fall of 1895. The paper itself, introduced in evidence, contains on one of its pages the statement that it is published by Joseph R. Dunlop, and in response to an inquiry by the court of one of the witnesses it was stated that it was not known that there was any other Joseph R. Dunlop in the newspaper business in the city of Chicago.

Now, taking those facts all together, is there any reasonable doubt in your mind that the Joseph R. Dunlop on trial before you is the publisher of this paper, or is there any reasonable doubt in your mind that when these papers were deposited in the post-office, if they were so deposited, it was done with his assent or knowledge? If there is not, then your duty is to find those facts in favor of the Government; if there is, you must give, as I said before, to the defendant the benefit of that doubt.

If you resolve those inquiries in favor of the Government, your next inquiry will be whether the publication is itself obscene, lewd, lascivious, or indecent.

160 You are not trying this case as if this court had the power to prohibit and punish the publication of obscene, lewd, and lascivious literature. The only point at which the power of the United States touches that sort of literature is the point at which that sort of literature touches the mails. The purpose of the Government by this statute is to prevent the mails from becoming contaminated with such literature, just as they would prevent the mails from carrying yellow fever or anything that would spread injury to the public at large.

Now, what is obscene, lascivious, lewd, or indecent publication is largely a question of your own conscience and your own opinion, but it must come, before it can be said to be such literature or publication, it must come up to this point, that it must be calculated with the ordinary reader to deprave him, deprave his morals or lead to impure purposes.

The mails do frequently carry publications that you would not read to your wives or daughters, and yet such carrying is not illegal. Our divorce courts every day are the scenes where confessions and narratives of impure proceedings are heard and taken down. But if a lawyer who had had such a case, and has taken a bill of exceptions or certificate of evidence, and has had it printed, to the Supreme Court to review it, should send his copy of the record to the clerk of the Supreme Court by mail, that would not be an illegal use of the mails for the purpose of carrying obscene and indecent

161 literature. So the mere fact that it may be obscene and indecent are not of themselves sufficient to characterize it as within this provision of the law.

As counsel said, the Bible contains some narratives which, disconnected from the text, would be regarded perhaps as improper to be read to your children. Certainly a great deal of classic literature is of that character; but in the case of the Bible the reading of the whole text shows that that which was of itself of an improper character is made proper because it is used for a proper purpose.

The story read to you on the argument is used to illustrate the dangers and to point out the follies of following an impure woman. Much of what is called the indecency of the classics is for the same purpose; so that in the end, although these things may present to your mind what, at first blush or on first sight, appears to be obscene, they, in the end, are not calculated to deprave your morals but to raise the standard of your morals and to strengthen and purify character. The purpose, therefore, has much to do with how you shall characterize the publication, the matter contained in the publication.

Now, reading these paragraphs that counsel have called to your attention—and you will take them with you to your jury-room—it is your duty to ascertain, in the first place, if they are calcu-

162 lated to deprave the morals; if they are calculated to lower that standard which we regard as essential to civilization;

if they are calculated to excite those feelings which in their proper field are all right, but which, transcending the limits of that proper field, play most of the mischief in the world. If they are, then they are obscene, lewd, and lascivious within the meaning of the statute; if not, then they are not so within the meaning of the statute.

I have been asked by the defendant in connection with this charge to give you certain special instructions, and such instructions as I give to you I give in connection with what I have already said.

The court instructs the jury that in this case the presumption of innocence means that it is a presumption of the law that the defendant did not deposit or cause to be deposited in the post-office for mailing any of the newspapers admitted in evidence, and this presumption should continue and prevail in the minds of the jury in such a way as to cause them to find the defendant not guilty, unless, from all the evidence in the case, beyond a reasonable doubt, the jury are convinced that the newspapers or some one of the newspapers admitted in evidence were deposited or caused to be deposited in the post-office for mailing by the defendant.

That is the law, and I give it to you in connection with
163 what I have already said relating to the circumstantial proof of the depositing of the newspapers.

The court instructs the jury that the presumption of innocence in this case means that the law presumes that not one of the newspapers introduced in evidence contains matter that is obscene, lewd, lascivious, or indecent, and that this presumption should continue and prevail in the minds of the jury in such a way as to cause them to acquit the defendant, unless, from all of the evidence in the case, the jury are convinced beyond a reasonable doubt that the newspapers or some one of the newspapers admitted in evidence does contain matter that is obscene, lewd, lascivious, or indecent.

That is simply a restatement of what I have already said.

The court instructs the jury that the presumption of innocence in this case means that the laws presumes that the defendant, Dunlop, did not know that any of the newspapers admitted in evidence in this case contained matter that was obscene, lewd, lascivious, or indecent at the time the said newspaper was published, and that this presumption of innocence should continue and prevail in the minds of the jury in such a way as to cause them to acquit the defendant, unless, from all the evidence in the case, the jury are convinced beyond a reasonable doubt that the defendant knew that the newspapers or some one of the newspapers admitted in evidence did contain matter that was obscene, lewd, lascivious, or indecent.

164 In that connection I charge this as the law: In that connection, if the defendant was the publisher of the paper and knew generally that just such articles as the one complained of were contained daily in the publication in his paper, then it is not necessary that you should find that he knew that these particular

paragraphs were in that paper; but you must first find beyond a reasonable doubt that he knew that the paper as a rule and a matter of habit was publishing paragraphs of the character complained of.

I also instruct you that the presumption of innocence in this case is stronger than any mere presumption that Joseph R. Dunlop continued to be the publisher of the Chicago Dispatch up to July 6th, 1895, even if the jury should believe, from all the evidence in the case, that at some time prior to July 6th, 1895, said Joseph R. Dunlop was the publisher of the Chicago Dispatch.

You can't, as a mere presumption, say that because he was the proprietor of the Dispatch on the 6th of July, that therefore he continued to be the proprietor of the Dispatch on the 6th of July. You must take all the facts into consideration, and if from all these facts you find that he was the proprietor and publisher, the presumption isn't of any consequence in the case—I mean the presumption alluded to in this instruction.

165 The fifth and sixth instructions I think I have already sufficiently covered.

I also instruct you that if you believe from the evidence in this case that any witness has wilfully sworn falsely to any fact material to the issue, that the jury are at liberty entirely to disregard the testimony of such witness, except in so far as the jury may believe, if they do believe, that said witness is corroborated by other witnesses in the case or by other circumstances or by circumstances in evidence in the case.

I also instruct you that in dealing with the circumstantial evidence you are not at liberty to assume any fact as proved which is not proved, and from such fact—issue—drew an inference to support the theory of the prosecution; but you are instructed, on the other hand, in dealing with circumstantial evidence, you are at liberty to draw inferences only from facts that are clearly proven.

It is your duty to enter upon the consideration of each circumstance, when you are looking at circumstantial evidence proven, if you find that any circumstance has been proven, having in your minds the presumption that the defendant is innocent, and in considering such circumstances you should apply to it the pre-

166 sumption of innocence, and if such fact or circumstance when considered in connection with all the evidence in the case, can be reasonably explained on the theory of the innocence of the accused, it *is* the duty of the jury to so explain it.

No circumstance introduced in evidence on this trial can be used by you as a basis for any inference that any one or all of the newspapers addressed to Mr. Montgomery or Mr. Williams was deposited in the post-office at Chicago for mailing, unless such circumstance is first proven beyond a reasonable doubt.

And any circumstance in this case admitted in evidence for the purpose of showing that any one or all of said newspapers were deposited in the post-office at Chicago for mailing, which is not so proved beyond a reasonable doubt, should be wholly dismissed from

your consideration, and must not be permitted to influence you to any extent against the defendant.

Now, gentlemen, if you, under the instruction of the court, taking all the proven facts in the case under consideration and accepting as proven those which are beyond a reasonable doubt, come to the conclusion that the defendant knowingly caused to be deposited in the post-office these papers introduced in evidence, and if an inspection of these papers causes you to come to the conclu-
167 sion that they contained obscene, lascivious, and indecent matter under the rules that I have given to you, it is your duty to return a verdict of guilty.

The columns are called columns "personal" and "baths." They are marked, I think. Those that the Government relies on are marked in blue pencil.

Otherwise it is your duty to bring in a verdict of not guilty.

168 Thereupon the counsel for the defendant took the following exceptions to the following portions of the charge:

And the court in the charge to the jury used the following language, against the defendant's objection:

"The testimony of the Government tends to show that with respect to the papers sent to Mr. Afee he, under the name of Williams, wrote to the Dispatch, in this city, asking them to send him the paper for a specified time and enclosing the subscription price for that period. This letter was written from St. Louis; that after that time he continued to receive the Dispatch. It was brought to his office by his messenger, supposedly from the post-office, though he himself personally does not know."

To the using of the foregoing language to the jury the defendant, by his counsel, then and there duly excepted on the ground that there is no evidence that any one of said papers was brought to Mr. McAfee's office by a messenger or any other person.

And the court in his charge to the jury used the following language, against the defendant's objection:

"Now, the testimony of the Government also tends to show that as a matter of fact the Dispatch during this period was delivered at the round-table for mailing purposes; that it was delivered there in considerable quantities and its weights taken by the weigher of the Post-office Department and reported to the clerk whose duty it was to record them."

To the using of the foregoing language to the jury the defendant, by his counsel, then and there duly excepted on the ground that the testimony referred to was improperly admitted.

169 And the court in his charge to the jury used the following language, against the defendant's objection:

"So that you are at liberty to take all these facts together, consider them together, and if upon that consideration as a whole you have no reasonable doubt but what the Dispatch was deposited in the office you are at liberty to find that it was so deposited, notwithstanding the fact that no witness saw it so deposited."

To the using of the foregoing language to the jury the defendant,

by his counsel, then and there duly excepted on the ground that said language casts the burden of proof upon the defendant.

And the court in his charge to the jury used the following language, against the defendant's objection:

"If, on the other hand, with all these facts in mind, and giving to each its due credit in weighing the probabilities, if you can see some reasonable ground for believing of or doubting that these particular papers were deposited in the post-office, you must give to the defendant the benefit of that doubt. It is your duty to come to a conclusion upon all those facts and the effect of all those facts the same as you would conscientiously come to a conclusion upon any other set of facts that come before you in life."

170 To the using of the foregoing language to the jury the defendant, by his counsel, then and there duly excepted on the ground that said language casts the burden of proof upon the defendant and permits them to decide the issues without reference to the rules of law.

And the court in his charge to the jury used the following language, against the defendant's objection:

"There is no technical rule, there is no limitation in courts of justice, that prevents you from applying to them" (the facts and circumstances in evidence) "just the same rules of good common sense—subject always, of course, to a conscientious exercise of that common sense—that you would apply to any other subject that came under your consideration and that demanded your judgment."

To the using of the foregoing language to the jury the defendant, by his counsel, then and there duly excepted on the ground that said language instructed the jury that they might depart from the well-known rules of law and base their verdict upon the rules of good common sense.

And the court in his charge to the jury used the following language, against the defendant's objection:

"If, after having done that, you have no reasonable doubt that these papers were deposited in the post-office, it is your duty to so find that fact. If you have, then, as I said before, give to the defendant the benefit of the doubt."

To the using of the foregoing language to the jury the defendant, by his counsel, then and there duly excepted on the ground that said language casts the burden of proof upon the defendant.

171 And the court in his charge to the jury used the following language, against the defendant's objection:

"That raises the question as to whether the defendant is the publisher of this paper or has such a connection with the paper that he must be held responsible as the publisher and deliverer of the paper. If the defendant holds such an office in the management of the Dispatch that whatever anybody else does with the Dispatch is under his guidance, with his assent, then he is responsible for that act just as much as if he had done it with his own hands. So you must ascertain from the evidence whether he is the publisher and whether, as such publisher, he knew that the paper was going through the post-office."

To the using of the foregoing language to the jury the defendant, by his counsel, then and there duly excepted on the ground that said language authorized the jury to conclude that the defendant delivered the newspapers in evidence to the mails from the fact that defendant was the publisher of the newspapers.

And the court in his charge to the jury used the following language, against the defendant's objection:

"The paper itself introduced in evidence contains on one of its pages the statement that it is published by Joseph R. Dunlop, and, in response to an inquiry by the court of one of the wit-
172 nesses, it was said that it was not known that there was any other Joseph R. Dunlop in the newspaper business in the city of Chicago."

To the using of the foregoing language to the jury the defendant, by his counsel, then and there duly excepted on the ground that it authorized the jury to find that defendant was the publisher from evidence improperly admitted, namely, the statement at the head of the editorial columns of the Chicago Dispatch, "by Joseph R. Dunlop."

And the court in his charge to the jury used the following language, against the defendant's objection:

"Now, taking these facts all together, is there any reasonable doubt in your mind that the Joseph R. Dunlop on trial before you is the publisher of this paper, or is there any reasonable doubt in your mind that when these papers were deposited in the post-office, if they were so deposited, it was done with his assent or knowledge? If there is not, then it is your duty to find these facts in favor of the Government. If there is, you must give, as I said before, to the defendant the benefit of that doubt."

To the using of the foregoing language to the jury the defendant, by his counsel, then and there duly excepted on the ground that said language casts the burden of proof upon the defendant.

And the court in his charge to the jury used the following language, against the defendant's objection:

"Now, what is an obscene, lascivious, lewd, or indecent
173 publication is largely a question of your own conscience and your own opinion; but it must come, before it can be said to be such literature or publication—it must come up to this point, that it must be calculated with the ordinary reader to deprave him—deprave his morals or lead to impure purposes."

To the using of the foregoing language to the jury the defendant, by his counsel, then and there duly excepted on the ground that said language does not correctly state the test of what constitutes obscene, lewd, lascivious, or indecent literature.

And the court in his charge to the jury used the following language, against the defendant's objection:

"Now, reading these paragraphs (the advertisements in evidence) that counsel have called to your attention, and you will take them with you to your jury-room, it is your duty to ascertain, in the first place, if they are calculated to deprave the morals; if they are calculated to lower that standard which we regard as essential to civili-

zation; if they are calculated to excite those feelings which, in their proper field, are all right, but which, transcending the limits of that proper field, play most of the mischief in the world. If they are, then they are obscene, lewd, and lascivious within the meaning of the statute. If not, then they are not so within the meaning of the statute."

174 To the using of the foregoing language to the jury the defendant, by his counsel, then and there duly excepted on the ground that said language does not correctly state the test of what is obscene, lewd, lascivious, or indecent literature.

Thereupon the defendant then and there requested the court to give the jury the following instruction:

"The court instructs the jury that the presumption of innocence in this case is stronger than the presumption that the Government employee who delivered the newspapers to Mr. Montgomery in the Chicago post-office building obtained said newspapers from the United States mails."

The court then and there refused to give the jury the above instruction; to which said ruling of the court in so refusing to give the jury the said instruction the defendant, by his counsel, then and there duly excepted on the ground that said instruction contains a correct statement of a rule of law applicable to the case.

Thereupon the defendant then and there requested the court to give the jury the following instruction:

"The court instructs the jury that the presumption of innocence in this case is stronger than the presumption that the person who deposited the copies of the Chicago Dispatch in the box in the St. Louis post-office building, from which box the witness

175 McAfee took said papers, obtained said newspapers from the United States mails."

The court then and there refused to give the jury the *the* above instruction; to which said ruling of the court in so refusing to give the jury the said instruction the defendant, by his counsel, then and there duly excepted on the ground that said instruction contains a correct statement of a rule of law applicable to the case.

Thereupon the defendant then and there requested the court to give the jury the following instruction:

"The court instructs the jury that the office of the witness, Mr. Montgomery, in the post-office building, in the city of Chicago, is not a part of the post-office within the meaning of the law upon which this indictment is based."

The court then and there refused to give the jury the above instruction; to which said ruling of the court in so refusing to give the jury the said instruction the defendant, by his counsel, then and there duly excepted on the ground that said instruction contains a correct statement of the law applicable to the case.

Thereupon the defendant then and there requested the court to give the jury the following instruction:

"The court instructs the jury that the place where the witness McAfee found certain newspapers in the city of St. Louis, Missouri, namely, the post-office inspector's office, is not a part of the post-

office at St. Louis within the meaning of the law upon which this indictment is based."

176 The court then and there refused to give the jury the above instruction; to which said ruling of the court in so refusing to give the jury the said instruction the defendant, by his counsel, then and there duly excepted on the ground that said instruction contains a correct statement of the law applicable to the case.

Thereupon the defendant then and there requested the court to give the jury the following instruction:

"The court instructs the jury that there is no evidence in this case tending to show that the newspapers containing the address of R. M. Williams came from or were taken from the post-office at St. Louis, Missouri."

The court then and there refused to give the jury the above instruction; to which said ruling of the court in so refusing to give the jury the said instruction the defendant, by his counsel, then and there duly excepted.

Thereupon the defendant then and there requested the court to give the jury the following instruction:

"The court instructs the jury that if they believe from all the evidence in this case that it was in the power of the Government to produce as witnesses in this case the persons who, it is claimed by the Government, took the newspapers addressed to R. M. Williams

177 from the post-office at St. Louis or the newspapers addressed to Mr. Montgomery from the round-table in the post-office in Chicago, then the jury are at liberty to draw the inference that the Government did not produce said persons as witnesses because the Government officers conducting the prosecution believed or feared that the testimony of such witnesses, if produced, would not tend to support the theory of the prosecution in this case."

The court then and there refused to give the jury the above instruction, except as it appears in the charge; to which said ruling of the court in so refusing to give the jury the said instruction the defendant, by his counsel, then and there duly excepted on the ground that said instruction contains a correct statement of a rule of law applicable to the case.

Thereupon the defendant then and there requested the court to give the jury the following instruction:

"That in dealing with circumstantial evidence an inference from an inference is strictly forbidden, and that therefore the jury are not at liberty in this case to assume that the clerk in the post-office inspector's office at St. Louis, Missouri, did his duty, and then to infer from the assumed fact that said chief clerk did his duty that said chief clerk took the newspapers addressed to R. M. Williams from the post-office at St. Louis, Missouri."

The court then and there refused to give the jury the above instruction, except as it already appears in the charge; to which said ruling of the court in so refusing to give the jury the said instruction the defendant, by his counsel, then and there duly ex-

178 cepted on the ground that said instruction contains a correct statement of a rule of law applicable to the evidence.

Thereupon the defendant then and there requested the court to give the jury the following instruction:

"And the jury are further instructed that they are not at liberty in this case to assume that the person or persons whose custom it was to bring the Chicago Dispatch to Mr. Montgomery followed that custom or did his or their duty and took the newspaper addressed to Mr. Montgomery from the so-called round-table in the post-office at Chicago, Illinois, and then infer from the assumed fact that such person or persons so followed the usual custom or did their duty, that said newspapers were actually deposited in the post-office at Chicago, Illinois, for mailing."

The court then and there refused to give the jury the above instruction except as it already appears in the charge; to which said ruling of the court in so refused to give the jury the said instruction the defendant, by his counsel, then and there duly excepted on the ground that said instruction contains a correct rule and direction applicable to the evidence.

Thereupon the defendant then and there requested the court to give the jury the following instruction:

"The court instructs the jury that any circumstance which is essential to a conclusion of guilt against the defendant should be established beyond all reasonable doubt before it can be used by the jury against the defendant."

179 The court then and there refused to give the jury the above instruction except as it already appears in the charge. To which said ruling of the court in so refusing to give the jury the said instruction the defendant, by his counsel, then and there duly excepted on the ground that said instruction contains a correct statement of a rule of law applicable to the case.

Thereupon the defendant then and there requested the court to give the jury the following instruction:

"The court instructs the jury that in order to justify the inference of guilt from circumstantial evidence the existence of the inculpatory facts must be inconsistent with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. If you can reconcile the facts in this case on any reasonable theory consistent with the innocence of the defendant, it is your duty to do so and to find the defendant not guilty."

The court then and there refused to give the jury the above instruction except as it already appears in the charge. To which ruling of the court in so refusing to give the jury the said instruction the defendant, by his counsel, then and there duly excepted on the ground that said instruction contains a correct statement of the law applicable to the case.

Thereupon the jury retired to consider of their verdict, and returned with a verdict of guilty.

180 And forasmuch as the said several proceedings and matters and exceptions do not appear of record in said case this bill of exceptions is presented to the court here by the defendant, with a prayer that the same may be signed and sealed by the court

here; which is done accordingly this 21st day of February, A. D. 1896.

(Signed) P. S. GROSSCUP,
District Judge.

Endorsed: Filed February 24th, 1896. T. C. MacMillan, clerk.

Afterwards, to wit, on the 28th day of February, A. D. 1896, came the said defendant, by his counsel, and filed in the clerk's office of said court his assignment of errors; which said assignment of errors in the words and figures following, to wit:

181 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

In the District Court for said Northern District of Illinois, Northern Division, December Term, 1895.

THE UNITED STATES OF AMERICA }
vs. } Indictment.
JOSEPH R. DUNLOP. }

And now comes the defendant, Joseph R. Dunlop, by William S. Forrest, his attorney, and says that in the record and proceedings and during the trial of the said district court in the above-entitled cause error has intervened to his prejudice, and this defendant here assigns the following errors, to wit:

Assignment first. That the said district court erred in overruling the motion of this defendant, made prior to the trial, to require the district attorney to file in said court the printed matter alleged in all and several the counts of the indictment to be obscene, lewd, lascivious, and indecent, for the purpose of enabling the defendant to demur prior to the trial to said indictment and each count thereof.

182 Assignment second. That the said district court erred in admitting in evidence the portion of a certain newspaper purporting to be a copy of the Chicago Dispatch for December 3rd, 1894; which said portion of said newspaper is marked "Government Exhibit 1" and is as follows:

GOV. EXHIBIT 1.

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY—12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

—AND—

Official Paper of Cook County.

Dispatch Building, 115-117 Fifth Avenue

TELEPHONES:

Business Offices 3495
Editorial Department . . . 3494

TERMS OF SUBSCRIPTIONS:

By mail, postage paid, one year. $3.50
By mail, postage paid, six months..... 2.00
By mail, postage paid, three months..... 1.25
(Mail subscriptions strictly in advance.)

THE DISPATCH,
115-117 Fifth Av., Chicago, Ill.

NEW YORK OFFICE.
86 World Building.....Max H. Fischer, Manager.

MONDAY, DECEMBER 3, 1894.

EIGHT PAGES

Objected to on the ground that said portion of said newspaper does not tend to show who was the publisher of said paper on December 3, 1894, and, secondly, that there is no proof that the paper of which said "Government Exhibit 1" is a portion is a copy of the Chicago Dispatch of December 3, 1894.

Objection overruled by court. Exception by defendant.

183 Assignment third. That the said district court erred in admitting in evidence the portion of a certain newspaper purporting to be a copy of the Chicago Dispatch for July 6, 1895; which said portion of said newspaper is as follows:

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY—12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

—AND—

Official Paper of Cook County.

Dispatch Building, 115–117 Fifth Avenue

TELEPHONES:

Business Offices 3495

Editorial Department . . . 3494

TERMS OF SUBSCRIPTIONS:

By mail, postage paid, one year.....$3.50

By mail, postage paid, six months..... 2.00

By mail, postage paid, three months..... 1.25

(Mail subscriptions strictly in advance.)

THE DISPATCH,

115–117 Fifth Avenue, Chicago, Ill.

NEW YORK OFFICE.

41 Times Building.....R. A. Craig, Manager.

TWELVE PAGES

SATURDAY, JULY 6, 1895.

Objected to on the ground that said portion of said newspaper does not tend to show who was the publisher of said newspaper on July 6, 1895, and, secondly, that there is no proof that the paper of which the foregoing is a portion is a copy of the Chicago
184 Dispatch for July 6, 1895.

Overruled by the court. Exception by the defendant.

Assignment fourth. That said district court erred in admitting in evidence the portion of a certain newspaper purporting to be a copy of the Chicago Dispatch for July 27, 1895; which said portion of said newspaper is as follows:

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY—12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

—AND—

Official Paper of Cook County.

Dispatch Building, 115-117 Fifth Avenue

TELEPHONES:

Business Offices - - - - - - 3495
Editorial Department - - - 3494

TERMS OF SUBSCRIPTIONS:

By mail, postage paid, one year $3.50
By mail, postage paid, six months..... 2.00
By mail, postage paid, three months..... 1.25
(Mail subscriptions strictly in advance.)

THE DISPATCH,
115-117 Fifth Avenue, Chicago, Ill.

NEW YORK OFFICE.
41 Times Building.....R. A. Craig, Manager.

TWELVE PAGES

SATURDAY, JULY 27, 1895.

Objected to on the ground that said portion of said newspaper does not tend to show who was the publisher of said newspaper on July 27, 1895, and, secondly, that there is no proof that the
185 newspaper of which the foregoing is a portion is a copy of the Chicago Dispatch for July 27, 1895.

Overruled by court. Exception by defendant's counsel.

Assignment fifth. That said district court erred in admitting in evidence the portion of a certain newspaper purporting to be a copy of the Chicago Dispatch for August 10, 1895; which said portion of said newspaper is as follows:

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY—12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

—AND—

Official Paper of Cook County.

Dispatch Building, 115–117 Fifth Avenue

TELEPHONES:

Business Offices - - - - - - - 3495
Editorial Department - - - 3494

TERMS OF SUBSCRIPTIONS:

By mail, postage paid, one year $1.50
By mail, postage paid, six months.....$2.00
By mail, postage paid, three months.....$1.25
(Mail subscriptions strictly in advance.)

THE DISPATCH,
115–117 Fifth Avenue, Chicago, Ill.

NEW YORK OFFICE.

41 Times Building..... .....R. A. Craig, Manager.

TWELVE PAGES

SATURDAY, AUGUST 10, 1895.

186 Objected to on the ground that said portion of said newspaper does not tend to show who was the publisher of said newspaper on August 10, 1895, and, secondly, that there is no proof that the paper of which the foregoing is a portion is a copy of the Chicago Dispatch of August 10, 1895.

Overruled by court. Exception by defendant's counsel.

Assignment sixth. That said district court erred in admitting in evidence the portion of a certain newspaper purporting to be a copy of the Chicago Dispatch for September 14, 1895; which said portion of said newspaper is as follows:

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY—12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

—AND—

Official Paper of Cook County.

Dispatch Building, 115–117 Fifth Avenue

TELEPHONES:

Business Offices 3495
Editorial Department . . . 3494

TERMS OF SUBSCRIPTIONS:

By mail, postage paid, one year..... $3.00
By mail, postage paid, six months..... 1.50
By mail, postage paid, three months..... .75
By mail, postage paid, one month..... .25

(Mail subscriptions strictly in advance.)

THE DISPATCH,
115–117 Fifth Avenue, Chicago, Ill.

NEW YORK OFFICE.

41 Times Building.....R. A. Craig, Manager.

TWELVE PAGES

SATURDAY, SEPTEMBER 14, 1895.

187 Objected to on the ground that said portion of said newspaper does not tend to show who was the publisher of said newspaper on September 14, 1895, and, secondly, that there is no proof that the newspaper of which the foregoing is a portion is a copy of the Chicago Dispatch for September 14, 1895.

Overruled by the court. Exception by defendant's counsel.

Assignment seventh. That said district court erred in admitting in evidence the portion of a certain newspaper purporting to be a copy of the Chicago Dispatch for October 19, 1895; which said portion of said newspaper is as follows:

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY—12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

—AND—

Official Paper of Cook County.

Dispatch Building, 115–117 Fifth Avenue

TELEPHONES:

Business Offices - - - - - - - 3495
Editorial Department - - - - 3494

TERMS OF SUBSCRIPTIONS:

By mail, postage paid, one year..... $3.00
By mail, postage paid, six months..... 1.50
By mail, postage paid, three months..... .75
By mail, postage paid, one month..... .25
(Mail subscriptions strictly in advance.)

THE DISPATCH,
115–117 Fifth Avenue, Chicago, Ill.

NEW YORK OFFICE.

41 Times Building.....R. A. Craig, Manager.

TWELVE PAGES

SATURDAY, OCTOBER 19, 1895.

188 Objected to on the ground that said portion of said newspaper does not tend to show who was the publisher of said newspaper on October 19, 1895, and, secondly, that there is no proof that the newspaper of which the foregoing is a portion is a copy of the Chicago Dispatch for October 19, 1895.

Overruled by the court. Exception by defendant's counsel.

Assignment eighth. That the said district court erred in permitting the witness Robert McAfee to make answer to all and several the questions following, to wit:

"What was this messenger who delivered these papers?"

Objected to by defendant's counsel on the ground that the testimony already shows that the witness does not know who put the newspapers in his box, except from hearsay and rumor.

"The COURT:

"Question. He was a messenger to your office for the purpose of bringing papers from the post-office to your office?

"Answer. For gathering mail for the inspectors and distributing it in a box provided in the post-office.

"Mr. JOHN C. BLACK: I propose to prove that this was the universal custom and the duty of this messenger.

"Mr. FORREST: I object. The witness was not there and does not know who put those papers in that box.

189 "The COURT: I will permit you to show what the duty of the messenger was."

To which ruling the defendant's counsel excepted.

"The COURT: What were the duties of this man whom you call a messenger?

"Answer. His title is really chief clerk.

"Question. Chief clerk of the inspector's office?

"Answer. Of the inspector's office; and then another clerk whose business it is to go to the box department and gather all the mails for the inspectors and bring it to the inspector's office and distribute it there, as the box clerks do down below.

"Question. He don't carry mail for the public at all?

"Answer. No, sir.

"Question. He only carries mail for the accommodation of the inspectors and officers of the post-office?

"Answer. It is his duty as an officer to bring the mail up into the office and put it into the box provided by the Government for each inspector's mail.

"Mr. FORREST: I move to exclude from the record and the consideration of the jury what the witness McAfee has just testified to with reference to the duty of the man that he supposed put those

190 newspapers in the box in the post-office, inspector's office (referring to 'Government Exhibit 2,' 'Government Exhibit 3,' 'Government Exhibit 4,' 'Government Exhibit 5'), on the ground that the witness McAfee has repeatedly stated that he did not see the man put those papers in that box; so that we are following a presumption upon a presumption. It looks to me like an inference from an inference."

Motion to exclude overruled by the court; to which ruling defendant's counsel excepted.

"Mr. BLACK: How long has this duty been so performed and how frequently by this messenger?"

Objected to. Objection overruled by the court. Exception by defendant's counsel.

"Answer. It has been the duty of the men occupying these positions ever since the office has been established. I don't remember when the office was established, but it has been eight or ten years,

I think. These duties were performed by that messenger several times every day."

Assignment ninth. That the said district court erred in refusing to exclude the following sentence from the testimony given by the witness John A. Montgomery, to wit:

"I am familiar with the fact that there is such a publication passing through the Chicago post-office as the Chicago Dispatch."

191 Exception by the defendant's counsel to the refusal of the court to exclude said sentence from the consideration of the jury.

Assignment tenth. That said district court erred in permitting the witness John A. Montgomery to make answer to all and several the questions following, to wit:

"Question. How long has that publication (referring to the Chicago Dispatch) been passing through the post-office?"

Objected to. Objection overruled. Exception by defendant's counsel.

"Answer. Well, I can't answer that question accurately, but I should say during the past three or four years.

"Question. Was the publication called the 'Chicago Dispatch' passing regularly through the mails for the six months preceding the months of July, August, September, or October of last year?"

Objected to. Objection overruled. Exception by defendant's counsel.

"Answer. Yes, sir; regularly. A paper that does not go regularly is suspended at once.

"Question. Have you received the Chicago Dispatch during all that time?"

Objected to. Objection overruled. Exception by defendant's counsel.

192 "Answer. Yes, sir."

Assignment eleventh. That the said district court erred in refusing to exclude from the consideration of the jury the following portion of an answer given by the witness John A. Montgomery, to wit:

"Where it is received direct from the publication office."

Motion to exclude the foregoing from an answer given by the witness John A. Montgomery.

Motion overruled. Exception by defendant's counsel.

Assignment twelfth. That the said district court in permitting the said witness John A. Montgomery to make answer to all and several the questions following to wit:

"Question. State whether or not that (referring to Government Exhibit 6) was delivered to you through the United States mail."

Objected to by the defendant's counsel as leading.

"Question. State how it was delivered to you.

"Answer. It was delivered to me through the regular channels of the mail, in the same manner that all other papers of this kind are delivered."

193 Assignment thirteenth. That the said district court erred in permitting the said witness John A. Montgomery to make answer to the question following, to wit:

"What are the duties of that messenger?"

Objected to. Objection overruled. Exception by defendant's counsel.

"Answer. In a general way, his duty is to do anything we tell him to do, and he has certain fixed things to do that he does every day.

"Question. Including this?

"Answer. Yes, sir."

Assignment fourteenth. The said district court erred in refusing to exclude from the testimony given by the witness John A. Montgomery the following, to wit:

"I received all of the morning and evening papers in this way regularly sent to me, with my name on them."

Motion to exclude the foregoing. Motion overruled. Exception by defendant's counsel.

Assignment fifteenth. The said district court erred in permitting the witness Francis A. Morse to make answer to the question following, to wit:

"Question. Have you any independent knowledge that the Dispatch was delivered to you during that period (referring to the period embraced by the months of July, August, September, and October, 1895)?"

194 Objected to. Objection overruled. Exception by defendant's counsel.

"Answer. Well, I know by the wagon that drove up, the cart marked 'Chicago Dispatch' on it, and unloaded there. If it happened to be unloaded when I was not there, I would examine the bags and see 'Chicago Dispatch,' so as to charge it to the right parties."

Assignment sixteenth. That the said district court erred in admitting in evidence a memorandum marked "Government Exhibit 9;" which said memorandum is as follows:

GOVERNMENT EXHIBIT 9.

Post-office, Chicago, Ill.

Memorandum of Second-class Mail Weighed on Platform.

JULY 6TH, 1895.

Name of publication or firm.	No. of sacks.	Gross weight.	Tare.	Net weight.
Arbeiter Zeitung, 2.18	1	37		
Abendpost, 3.00	1	20		
Drovers' Journal, 4.20	50	984		
Daily News, 2.35	1	8		
" " 3.30	2	83		
Dispatch, 3.55	2	132		
Evening Journal, 2.12	1	6		
" " 3.35	2	128		
Evening Post, 3.20	1	24		
" " 4.10	4	148		
Der Republikaner, 2.10	0	6		
Freie Presse, 3.00	1	16		
Mail, 2.45	0	4		
Furniture Bulletin, 1.55	0	6		
Western News, 3.35	0	3		
E. S. Zeitung, 3.55	2	110		
Total				

F. A. MORSE, *Weigher.*

195 Objection to the admission of Government Exhibit 9 in evidence. Objection overruled. Exception by defendant's counsel.

Assignment seventeenth. That the said district court erred in admitting in evidence a memorandum marked "Government Exhibit 10;" which said memorandum is as follows:

GOVERNMENT EXHIBIT 10.

Post-office, Chicago, Ill.

Memorandum of Second-class Mail Weighed on Platform.

JULY 27, 1895.

Name of publication or firm.	No. of sacks.	Gross weight.	Tare.	Net weight.
+ Arbeiter Zeitung, 2.35	1	38		
+ Abendpost, 2.35	1	18		
+ Drovers' Journal, 4.10	51	983		
+ Daily News, 2.20	1	8		
+ " " 3.35	2	84		
+ Dispatch, 3.56	2	150		
+ Evening Journal, 2.15	1	6		
+ " " 3.45	2	136		
+ Evening Post, 3.20	1	29		
+ " " 4.15	4	153		
+ Der Republikaner, 1.25	0	6		
+ Freie Presse, 3.16	1	16		
+ Mail				
+ Furniture Bul.	1	23		
+ Western News, 3.45	20	1,932		
+ E. S. Zeitung, 3.30	2	112		
Total				

F. A. MORSE, *Weigher.*

Objection to the admission of Government Exhibit 10 in evidence. Objection overruled. Exception by defendant's counsel.

196 Assignment eighteenth. That the said district court erred in admitting in evidence a memorandum marked "Government Exhibit 11;" which said memorandum is as follows:

GOVERNMENT EXHIBIT 11.

Post-office, Chicago, Ill.

Memorandum of Second-class Mail Weighed on Platform.

SEPT. 14TH, 1895.

Name of publication or firm.	No. of sacks.	Gross weight.	Tare.	Net weight.
Arbeiter Zeitung, 2.47	1	38	✓	
Abendpost, 2.42	1	17	✓	
Drovers' Journal, 4.10	51	978	✓	
Daily News, 2.22	1	8	✓	
" " 3.35	2	87	✓	
Dispatch, 4.00	2	141	✓	
Evening Journal, 2.18	1	5	✓	
" " 3.45	2	133	✓	
Evening Post, 2.58	1	23	✓	
" " 4.15	4	146	✓	
Der Republikaner, 2.00	0	3	✓	
Freie Presse, 3.12	1	15	✓	
Mail				
Skandinaven				
Western News, 3.45	0	2	✓	
E. S. Zeitung, 3.40	2	107	✓	
Total				

F. A. MORSE, *Weigher.*

Objection to the admission of "Government Exhibit 11" in evidence. Objection overruled. Exception by defendant's counsel.

197 Assignment nineteenth. That the said district court erred in admitting in evidence a memorandum marked "Government Exhibit 12;" which said memorandum is as follows:

GOVERNMENT EXHIBIT 12.

Post-office, Chicago, Ill.

Memorandum of Second-class Mail Weighed on Platform.

OCT. 19TH, 1895.

Name of publication or firm.	No. of sacks.	Gross weight.	Tare.	Net weight.
Arbeiter Zeitung, 2.20	1	34		
Abendpost, 3 00	1	21		
Drovers' Journal, 4.40	51	990		
Daily News, 2.25	1	5		
" " 3.37	2	115		
Dispatch, 4.05	3	160		
Evening Journal, 2.20	1	6		
" " 3.50	2	137		
Evening Post, 3.15	1	20		
" " 4.15	4	145		
Der Republikaner				
Freie Presse, 2.50	1	15		
Press, 4.35	2	78		
Skandinaven				
Western News, 3.50	0	5		
E. S. Zeitung, 3.58	2	104		
Total				

F. A. MORSE, *Weigher.*

Objection to the admission of "Government Exhibit 12" in evidence. Objection overruled. Exception by defendant's counsel.

198 Assignment twentieth. That the said district court erred in admitting in evidence the following memorandum, marked "Government Exhibit 13," to wit:

GOVERNMENT EXHIBIT 13.

Post-office, Chicago, Ill.

Memorandum of Second-class Mail Weighed on Platform.

AUGUST 10TH, 1895.

Name of publication or firm.	No. of sacks.	Gross weight.	Tare.	Net weight.
Arbeiter Zeitung, 2.15	1	42		
Abendpost, 2.40	1	23		
Drovers' Journal, 4.40	51	1,014		
Daily News, 2.20	1	5		
" " 3.35	2	88		
Dispatch, 4.00	2	138		
Evening Journal, 2.10	1	13		
" " 3.45	2	132		
Evening Post, 3.10	1	18		
" " 4.10	4	157		
Der Republikaner				
Freie Presse, 3.15	1	16		
Mail, 2.35	1	34		
Skandinaven				
Western News				
E. S. Zeitung, 3.50	2	111		
Total				

J. J. BURKE, *Weigher.*

Objection to the admission of said "Government Exhibit 13" in evidence. Objection overruled. Exception by defendant's counsel.

199 Assignment twenty-first. That the said district court erred in admitting in evidence the following memorandum, marked "Government Exhibit 14," to wit:

GOV. EXHIBIT 14.

8. 11.

All receipts in this book must be accounted for. Return all defective sheets to auditor.

Memorandum Weight Receipt.

No. J 53249.

For superintendent.

Hour mailed: ——.

CHICAGO POST-OFFICE, *July* 6, 1895.

Received from Dispatch in weight as follows:

Number pounds	132
No. sacks, 2; tare	5
Net	
Amount of postage	$1 27

HENRY,
Weighing Clerk.

Objection. Objection overruled. Exception by defendant's counsel.

200 Assignment twenty-second. That the said district court erred in admitting in evidence the following memorandum, marked "Government Exhibit 15," to wit:

GOVERNMENT EXHIBIT 15.

16.

All receipts in this book must be accounted for. Return all defective sheets to auditor.

Memorandum Weight Receipt.

No. J 63999.

For superintendent.

Hour mailed: ——.

CHICAGO POST-OFFICE, *Sept.* 14, 1895 *189–*.

Received from Dispatch in weight as follows:

Number pounds	141
No. sacks, 2; tare	5
Net	
Amount of postage	$1 36

HENRY,
Weighing Clerk.

Objection. Objection overruled. Exception by defendant's counsel.

201 Assignment twenty-third. That the said district court erred in admitting in evidence the following memorandum, marked "Government Exhibit 16," to wit:

GOVERNMENT EXHIBIT 16.

21.

All receipts in this book must be accounted for. Return all defective sheets to auditor.

Memorandum Weight Receipt.

No. K 5713.

For superintendent.

Hour mailed: ——.

CHICAGO POST-OFFICE, *Oct.* 19, 1895 *189–*.

Received from Dispatch in weight as follows:

Number pounds.....	160
No. sacks, 3; tare.....	7
Net	
Amount of postage	$1 53

HENRY,
Weighing Clerk.

Objection. Overruled. Exception by defendant's counsel.

202 Assignment twenty-fourth. That the said district court erred in permitting the witness T. Ohlander to make answers to all and several the following questions, to wit:

"Question. State whether or not on each and all of those days" (referring to all the days from July 1 to October 31, 1895) "you received the paper called the 'Chicago Dispatch' at the post-office."

Objected to. Objection overruled. Exception by defendant's counsel.

"Answer. We did receive it—that is, we did receive it so far as I know. I put the answer that way for the reason that I should be notified if I had not received it.

"Question. Do you now remember of having received the 'Dispatch' at that place every day during that period (referring to the period embraced in the last question)?"

Objected to. Objection overruled. Exception by defendant's counsel.

"Answer. Yes; I may say I do."

203 Assignment twenty-fifth. That the said district court erred in admitting in evidence the paper marked "Government Exhibit 2;" which said paper contains the columns headed "personal" and "baths," of a certain newspaper that purported to be the "Chicago Dispatch" of July 6, 1895, and is as follows:

(Here follows "Government Exhibit 2," marked p. 204.)

205 Said paper was objected to on the following grounds:

First. That the evidence failed to show that it was deposited in the Chicago post-office for mailing.

Second. That the evidence failed to show that it was caused to be deposited in the Chicago post-office for mailing by the defendant.

Third. That the evidence failed to show that it is a copy of the "Chicago Dispatch."

Fourth. The evidence failed to show that it is a copy of the paper described in any one of the counts of the indictment as the "Chicago Dispatch."

Fifth. That it is not the paper described in any count of the indictment, because it does not, under the headings "personal" and "baths," contain matter that is too long or too obscene to be set out in the indictment or spread upon the records of the court.

Sixth. That there is a variance between said "Government Exhibit 2" and the sixth count of the indictment.

Seventh. That said "Government Exhibit 2" does not tend to support the allegation in the sixth count of the indictment, because what is published therein under the headings "personal" and "baths" is not too long or too obscene to be set out in the indictment or spread upon the records of the court.

Said objection overruled by the court. Exception by defendant's counsel.

206 Assignment twenty-sixth. That the said district court erred in admitting in evidence the paper marked "Government Exhibit 3;" which said paper contains the columns headed "personal" and "baths," of a certain newspaper that purported to be the "Chicago Dispatch" of July 27, 1895, and is as follows:

(Here follows "Government Exhibit 3," marked p. 207.)

208 Said paper was objected to on the following grounds:

First. That the evidence failed to show that it was deposited in the Chicago post-office for mailing.

Second. That the evidence failed to show that it was caused to be deposited in the Chicago post-office for mailing by the defendant.

Third. That the evidence failed to show that it is a copy of the "Chicago Dispatch."

Fourth. The evidence failed to show that it is a copy of the paper described in any one of the counts of the indictment as the "Chicago Dispatch."

Fifth. That it is not the paper described in any count of the indictment, because it does not, under the headings "personal" and

"baths," contain matter that is too long or too obscene to be set out in the indictment or spread upon the records of the court.

Sixth. That there is a variance between said "Government Exhibit 3" and the twelfth count of the indictment.

Seventh. That said "Government Exhibit 3" does not tend to support the allegation in the twelfth count of the indictment, because what is published therein under the headings "personal" and "baths" is not too long or too obscene to be set out in the indictment or spread upon the records of the court.

Said objection overruled by the court. Exception by defendant's counsel.

209 Assignment twenty-seventh. That the said district court erred in admitting in evidence the paper marked "Government Exhibit 4;" which said paper contains the columns headed "personal" and "baths," of a certain newspaper that purported to be the "Chicago Dispatch" of August 10, 1895, and is as follows:

(Here follows "Government Exhibit 4," marked p. 210.)

211 Said paper was objected to on the following grounds:

First. That the evidence failed to show that it was deposited in the Chicago post-office for mailing.

Second. That the evidence failed to show that it was caused to be deposited in the Chicago post-office for mailing by the defendant.

Third. That the evidence failed to show that it is a copy of the "Chicago Dispatch."

Fourth. The evidence failed to show that it is a copy of the paper described in any one of the counts of the indictment as the "Chicago Dispatch."

Fifth. That it is not the paper described in any count of the indictment, because it does not, under the headings "personal" and "baths," contain matter that is too long or too obscene to be set out in the indictment or spread upon the records of the court.

Sixth. That there is a variance between said "Government Exhibit 4" and the sixteenth count of the indictment.

Seventh. That said "Government Exhibit 4" does not tend to support the allegation in the sixteenth count of the indictment, because what is published therein under the headings "personal" and "baths" is not too long or too obscene to be set out in the indictment or spread upon the records of the court.

Said objection overruled by the court. Exception by defendant's counsel.

212 Assignment twenty-eighth. That the said district court erred in admitting in evidence the paper marked "Government Exhibit 5;" which said paper contains the columns headed "personal" and "baths," of a certain newspaper that purported to be the "Chicago Dispatch" of September 14, 1895, and is as follows:

(Here follows "Government Exhibit 5," marked p. 213.)

214 Said paper was objected to on the following grounds:

First. That the evidence failed to show that it was deposited in the Chicago post-office for mailing.

Second. That the evidence failed to show that it was caused to be deposited in the Chicago post-office for mailing by the defendant.

Third. That the evidence failed to show that it is a copy of the "Chicago Dispatch."

Fourth. The evidence failed to show that it is a copy of the paper described in any one of the counts of the indictment as the "Chicago Dispatch."

Fifth. That it is not the paper described in any count of the indictment, because it does not, under the headings "personal" and "baths," contain matter that is too long or too obscene to be set out in the indictment or spread upon the records of the court.

Sixth. That there is a variance between said "Government Exhibit 5" and the twenty-sixth count of the indictment.

Seventh. That said "Government Exhibit 5" does not tend to support the allegation in the twenty-sixth count of the indictment, because what is published therein under the headings "personal" and "baths" is not too long or too obscene to be set out in the indictment or spread upon the records of the court.

Said objection overruled by the court. Exception by defendant's counsel.

215 Assignment twenty-ninth. That the said district court erred in admitting in evidence the paper marked "Government Exhibit 6;" which said paper contains the columns headed "personal" and "baths," of a certain newspaper that purported to be the "Chicago Dispatch" of July 6, 1895, and is as follows:

(Here follows "Government Exhibit 6," marked p. 216.)

217 Said paper was objected to on the following grounds:

First. That the evidence failed to show that it was deposited in the Chicago post-office for mailing.

Second. That the evidence failed to show that it was caused to be deposited in the Chicago post-office for mailing by the defendant.

Third. That the evidence failed to show that it is a copy of the "Chicago Dispatch."

Fourth. The evidence failed to show that it is a copy of the paper described in any one of the counts of the indictment as the "Chicago Dispatch."

Fifth. That it is not the paper described in any count of the indictment, because it does not, under the headings "personal" and "baths," contain matter that is too long or too obscene to be set out in the indictment or spread upon the records of the court.

Sixth. That there is a variance between said "Government Exhibit 6" and the sixth count of the indictment.

Seventh. That said "Government Exhibit 6" does not tend to support the allegation in the sixth count of the indictment, because what is published therein under the headings "personal" and

"baths" is not too long or too obscene to be set out in the indictment or spread upon the records of the court.

Said objection overruled by the court. Exception by defendant's counsel.

218 Assignment thirtieth. That the said district court erred in admitting in evidence the paper marked "Government Exhibit 7;" which said paper contains the columns headed "personal" and "baths," of a certain newspaper that purported to be the "Chicago Dispatch" of September 14, 1895, and is as follows:

(Here follows "Government Exhibit 7," marked p. 219.)

220 Said paper was objected to on the following grounds:

First. That the evidence failed to show that it was deposited in the Chicago post-office for mailing.

Second. That the evidence failed to show that it was caused to be deposited in the Chicago post-office for mailing by the defendant.

Third. That the evidence failed to show that it is a copy of the "Chicago Dispatch."

Fourth. The evidence failed to show that it is a copy of the paper described in any one of the counts of the indictment as the "Chicago Dispatch."

Fifth. That it is not the paper described in any count of the indictment, because it does not, under the headings "personal" and "baths," contain matter that is too long or too obscene to be set out in the indictment or spread upon the records of the court.

Sixth. That there is a variance between said "Government Exhibit 7" and the twenty-sixth count of the indictment.

Seventh. That said "Government Exhibit 7" does not tend to support the allegation in the twenty-sixth count of the indictment, because what is published therein under the headings "personal" and "baths" is not too long or too obscene to be set out in the indictment or spread upon the records of the court.

Said objection overruled by the court. Exception by defendant's counsel.

221 Assignment thirty-first. That the said district court erred in admitting in evidence the paper marked "Government Exhibit 8;" which said paper contains the columns headed "personal" and "baths," of a certain newspaper that purported to be the "Chicago Dispatch" of October 19, 1895, and is as follows:

(Here follows "Government Exhibit 8," marked p. 222.)

223 Said paper was objected to on the following grounds:

First. That the evidence failed to show that it was deposited in the Chicago post-office for mailing.

Second. That the evidence failed to show that it was caused to be deposited in the Chicago post-office for mailing by the defendant.

Third. That the evidence failed to show that it is a copy of the "Chicago Dispatch."

Fourth The evidence failed to show that it is a copy of the paper described in any one of the counts of the indictment as the "Chicago Dispatch."

Fifth. That it is not the paper described in any count of the indictment, because it does not, under the headings "personal" and "baths," contain matter that is too long or too obscene to be set out in the indictment or spread upon the records of the court.

Sixth. That there is a variance between said "Government Exhibit 8" and the thirty-second count of the indictment.

Seventh. That said "Government Exhibit 8" does not tend to support the allegation in the thirty-second count of the indictment, because what is published therein under the headings "personal" and "baths" is not too long or too obscene to be set out in the indictment or spread upon the records of the court.

Said objection overruled by the court. Exception by defendant's counsel.

224 Assignment thirty-second. That the said district court erred in overruling a motion, made by defendant's counsel after the evidence was closed, to instruct the jury to return a verdict of not guilty. Said motion was urged on the following grounds:

First. There is no evidence in the record tending to show that the defendant caused to be deposited in the Chicago post-office, for mailing, any one of the newspapers admitted in evidence that purports to be a portion of a copy of the "Chicago Dispatch."

Second. That the evidence fails to show that all and several the newspapers admitted in evidence which purport to be portions of copies of the "Chicago Dispatch" are copies of the "Chicago Dispatch."

Third. That the evidence fails to show that any one of the newspapers admitted in evidence and which purports to be a portion of a copy of the "Chicago Dispatch" contained any matter in print that is obscene, lewd, lascivious, or indecent.

Fourth. That the evidence fails to show that the defendant knew that any of the documents admitted in evidence as papers which purport to be portions of copies of the "Chicago Dispatch" contained any matter that was obscene, lewd, lascivious, or indecent.

Said motion was overruled by the court. Exception by defendant's counsel.

225 Assignment thirty-fourth. That the said district court erred in permitting the United States district attorney, who tried the case on behalf of the Government, to use in his argument to the jury, made after the evidence was closed, the following language, to wit:

"There is not a single line or word of evidence in this case disputing the fact that Dunlop for two years last past has been the proprietor, publisher, and manager of this paper."

To which language defendant's counsel then and there duly excepted.

Assignment thirty-fifth. That the said district court erred in permitting the said United States district attorney, who tried the case

on behalf of the Government, to use in his argument to the jury, made after the evidence was closed, the following language, to wit:

"UNITED STATES DISTRICT ATTORNEY: I do not believe that there are twelve men that could be gathered by the venire of this court within the confines of the State of Illinois, except where they were bought and perjured in advance, whose verdict I would not be willing to take upon the question of the indecency, lewdness, lasciviousness, licentiousness, and wrong of those publication-."

To which language counsel for defendant then and there duly excepted.

226 Thereupon counsel for defendant called the — of the court to said language used by the district attorney, and thereupon the court said:

"Let your exception be noted. I hardly think that last remark was proper. That is not an appeal to the evidence. It is an appeal to something outside of the evidence. Of course, there is nothing I can do with it except to say that it is improper and I hope it won't be repeated."

"General BLACK: I withdraw the language."

Assignment thirty-sixth. That serious error, highly prejudicial to the defendant, was committed in this, that in his argument to the jury, after the evidence was closed, the United States district attorney, who conducted the cause on behalf of the Government, spoke to the jury as follows:

"I do not believe that there are twelve men who could be gathered by the venire of this court within the confines of the State of Illinois, except where they were bought and perjured in advance, whose verdict I would not be willing to take upon the question of the indecency, the lewdness, lasciviousness, licentiousness, and wrong of those publication-."

Said remarks were then and there promptly called to the attention of the court and duly excepted to by counsel for defendant.

227 Assignment thirty-seventh. That the said district court erred in permitting the United States district attorney in his argument to the jury, after the evidence was closed, to say:

"Now, gentlemen, it is not necessary for me to tell you what the massage treatment is—how a man is stripped naked from the sole of his feet to the crown of his head and rubbed with the hands."

Exception to said language by counsel for defendant.

The court's attention was called to said language and the court sanctioned the same by ruling that said language was properly used.

Assignment thirty-eighth. That the said district court erred in making the following ruling upon the following remarks of the United States district attorney in the argument of said United States district attorney to the jury:

"Now, gentlemen, it is not necessary for me to tell you what the massage treatment is—how a man is stripped naked from the sole of his feet to the crown of his head and rubbed with the hands."

"The COURT: Well, I suppose massage, like walking, is so well

known that everybody knows what it is. I don't suppose there would be any harm in the district attorney stating what walking is."

"Certainly not," responded counsel for defendant.

And thereupon the court said:

"Then I do not think there is any impropriety in the district attorney stating what the massage treatment is."

228 Assignment thirty-ninth. That the said district court erred in using the following language in his charge to the jury, to wit: "The testimony of the Government tends to show that with respect to the papers sent to Mr. McAtee, he, under the name of Williams, wrote to the Dispatch in this city asking them to send him the paper for a specified time and enclosing the subscription price for that period; this letter was written from St. Louis; that after that time he continued to receive the Dispatch; it was brought to his office by his messenger, supposedly from the post-office, though he himself personally does not know."

Exception by defendant's counsel to the use of the foregoing portion of the charge to the jury, on the ground that there is no evidence that any one of said papers was brought to Mr. McAfee's office by the messenger.

Assignment fortieth. That the said district court erred in using the following language in his charge to the jury, to wit: "Now the testimony of the Government also tends to show that as a matter of fact the Dispatch during this period was delivered at the round-table for mailing purposes; that it was delivered there in considerable quantities and its weights taken by the weigher of the Post-office Department and reported to the clerk whose duty it was to record them."

229 Exception by defendant's counsel to the use of the foregoing portion of the charge on the ground that the testimony referred to in said portion of the charge was improperly admitted.

Assignment forty-first. That the said district court erred in using the following language in his charge to the jury, to wit: "So that you are at liberty to take all these facts together, consider them together, and if upon their consideration as a whole you have no reasonable doubt but what the Dispatch was deposited in the office, you are at liberty to find that it was so deposited, notwithstanding the fact that no witness saw it deposited."

Exception by defendant's counsel to the use of the foregoing portion of the charge on the ground that said language casts the burden of proof upon the defendant.

Assignment forty-second. That the said district court erred in using the following language in his charge to the jury, to wit: "If, on the other hand, with all these facts in mind and giving to each its due credit in weighing the probabilities, if you can see some reasonable ground for believing of or doubting that these particular papers were deposited in the post-office, you must give to the defendant the benefit of that doubt. It is your duty to come to a

230 conclusion upon all those facts and the effect of all those facts the same as you would conscientiously come to a conclusion upon any other set of facts that come before you in life."

Exception by defendant's counsel to the use of the foregoing language on the ground that said language casts upon the defendant the burden of proof and permits the jury to decide the issues without reference to the rules of law.

Assignment forty-third. That the said district court erred in using the following language in his charge to the jury, to wit: "There is no technical rule, there is no limitation in courts of justice that prevents you from applying to them" (the facts and circumstances in evidence) "just the same rules of good common sense, subject always, of course, to a conscientious exercise of that common sense, that you would apply to any other subject that came under your consideration and that demanded your judgment."

Exception by defendant's counsel to the use of the foregoing language on the ground that the said language instructed the jury that the jury might depart from the well-known rules of law and base their verdict on the rules of good common sense.

231 Assignment forty-fourth. That the said district court erred in using the following language in his charge to the jury, to wit: "If after having done that you have no reasonable doubt that these papers were deposited in the post-office, it is your duty to so find that fact. If you have, then, as I said before, give the defendant the benefit of the doubt."

Exception by defendant's counsel to the use of the foregoing language on the ground that said language casts upon the defendant the burden of proof.

Assignment forty-fifth. That the said district court erred in using the following language in his charge to the jury, to wit: "That raises the question as to whether the defendant is the publisher of this paper or has such a connection with the paper that he must be held responsible as the publisher and deliverer of the paper. If the defendant holds such an office in the management of the Dispatch that whatever anybody else does with the Dispatch is under his guidance, with his assent, then he is responsible for that act just as much as if he had done it with his own hand. So you must ascertain from the evidence whether he is the publisher and whether as such publisher he knew that the paper was going through the post-office."

232 Exception by defendant's counsel to the use of the foregoing language on the ground that said language authorized the jury to conclude that the defendant delivered the newspapers in evidence to the mails from the fact that the defendant was the publisher of the newspapers.

Assignment forty-sixth. That the said district court erred in using the following language in his charge to the jury, to wit: "The paper itself, introduced in evidence, contains on one of its pages the statement that it is published by Joseph R. Dunlop, and in response to an inquiry by the court of one of the witnesses it was stated that it was not known that there was any other Joseph R. Dunlop in the newspaper business in the city of Chicago."

Exception by defendant's counsel to the use of the foregoing language on the ground that said language authorized the jury to find

that defendant was the publisher from evidence improperly admitted, namely, the statement at the head of the editorial column of the Chicago Dispatch, "By Joseph R. Dunlop."

Assignment forty-seventh. That the said district court erred in using the following language in his charge to the jury, to wit:

"Now, taking these facts altogether, is there any reasonable
233 doubt in your mind that the Joseph R. Dunlop on trial before you is the publisher of this paper or is there any reasonable doubt in your mind that when these papers were deposited in the post-office, if they were so deposited, it was done with his assent or knowledge? If there is not, then it is your duty to find these facts in favor of the Government. If there is, you must give, as I said before, to the defendant the benefit of that doubt."

Exception by defendant's counsel to the use of the foregoing language on the ground that said language casts upon the defendant the burden of proof.

Assignment forty-eighth. That the said district court erred in using the following language in his charge to the jury, to wit: "Now, what is an obscene, lascivious, lewd, or indecent publication is largely a question of your own conscience and your own opinion, but it must come before it can be said to be such literature or publication—it must come up to this point, that it must be calculated with the ordinary reader to deprave him—deprave his morals or lead to impure purposes."

Exception by defendant's counsel to the use of the foregoing language on the ground that said language does not correctly state the test of what constitutes obscene, lewd, lascivious, or indecent literature.

234 Assignment forty-ninth. That the said district court erred in using the following language in his charge to the jury, to wit: "Now, reading these paragraphs (the advertisements in evidence) that counsel have called to your attention, and you will take them with you to your jury-room, it is your duty to ascertain in the first place if they are calculated to deprave the morals, if they are calculated to lower that standard which we regard as essential to civilization; if they are calculated to excite those feelings which in their proper field are all right, but which transcending the limits of that proper field play most of the mischief in the world. If they are, then they are obscene, lewd, and lascivious within the meaning of the statute. If not, then they are not so within the meaning of the statute."

Exception by defendant's counsel to the use of the foregoing language on the ground that said language does not correctly state the test of what is obscene, lewd, lascivious, or indecent literature.

Assignment fiftieth. That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that the presumption of innocence in this case is stronger than the presumption that the Government employee who
delivered the newspapers to Mr. Montgomery in the Chicago
235 post-office building obtained said newspapers from the United States mails."

Exception by defendant's counsel to the refusal to give said instruction on the ground that said instruction contains a correct statement of a rule of law applicable to the case.

Assignment fifty-first. That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that the presumption of innocence in this case is stronger than the presumption that the person who deposited the copies of the Chicago Dispatch in the box in the St. Louis post-office building, from which box the witness McAfee took said papers, obtained said newspapers from the United States mails."

Exception by defendant's counsel to the court's refusal to give the said instruction on the ground that said instruction contains a correct statement of a rule of law applicable to the case.

Assignment fifty-second. That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that the office of the witness Mr. Montgomery, in the post-office building in the city of Chicago, is not a part of
236 the post-office within the meaning of the law upon which this indictment is based."

Exception by defendant's counsel to the refusal of the court to give the said instruction on the ground that said instruction contains a correct rule of the law applicable to the case.

Assignment fifty-third. That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that the place where the witness McAfee found certain newspapers in the city of St. Louis, Missouri, namely, the post-office inspector's office, is not a part of the post-office at St. Louis within the meaning of the law upon which this indictment is based."

Exception by defendant's counsel to the refusal of the court to give said instruction to the jury on the ground that said instruction contains a correct statement of the law applicable to the case.

Assignment fifty-fourth. That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that there is no evidence in this case tending to show that the newspapers containing the address of
237 R. M. Williams came from or were taken from the post-office at St. Louis, Missouri."

Exception by defendant's counsel to the refusal of the court to give the said instruction.

Assignment fifty-fifth. That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that if they believe from all the evidence in this case that it was in the power of the Government to produce as witnesses in this case the persons who it is claimed by the Government took the newspapers addressed to R. M. Williams from the post-office at St. Louis or the newspapers addressed to Mr. Montgomery from the round table in the post-office in Chicago, then the jury are at liberty to draw the inference that the Government did not produce said persons as witnesses because the Government officers conducting the prosecution believed or feared that the testi-

mony of such witnesses, if produced, would not tend to support the theory of the prosecution in this case."

Exception by defendant's counsel to the refusal of the court to give said instruction on the ground that said instruction contains a correct statement of a rule of law applicable to the case.

238 Assignment fifty-sixth. That the said district court erred in refusing to give the jury the following instruction, to wit: "That in dealing with circumstantial evidence an inference from an inference is strictly forbidden, and that therefore the jury are not at liberty in this case to assume that the clerk in the post-office inspector's office at St. Louis, Missouri, did his duty, and then to infer from the assumed fact that said chief clerk did his duty that said chief clerk took the newspapers addressed to R. M. Williams from the post-office at St. Louis, Missouri."

Exception by defendant's counsel to the refusal of the court to give the foregoing instruction on the ground that said instruction contains a correct statement of a rule of law applicable to the case.

Assignment fifty-seventh. That the said district court erred in refusing to give the jury the following instruction, to wit: "And the jury are further instructed that they are not at liberty in this case to assume that the person or persons whose custom it was to bring the Chicago Dispatch to Mr. Montgomery followed that custom or did his or their duty and took the newspaper addressed to Mr. Montgomery from the so-called round table in the post-office at Chicago, Illinois, and then infer from the assumed fact that such

239 person or persons so followed the usual custom or did their duty that said newspapers were actually deposited in the post-office at Chicago, Illinois, for mailing."

Exception by defendant's counsel to the refusal of the court to give the foregoing instruction on the ground that said instruction contains a correct rule and direction applicable to the evidence.

Assignment fifty-eighth. That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that any circumstance which is essential to a conclusion of guilt against the defendant should be established beyond all reasonable doubt before it can be used by the jury against the defendant."

Exception by defendant's counsel to the refusal of the court to give the foregoing instruction on the ground that said instruction contains a correct statement of the rule of law applicable to the case.

Assignment fifty-ninth. That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that in order to justify the inference of guilt from circumstantial evidence the existence of the inculpatory facts

240 must be inconsistent with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. If you can reconcile the facts in this case on any reasonable theory consistent with the innocence of the defendant, it is your duty to do so and to find the defendant not guilty."

Exception by defendant's counsel to the refusal of the court to

give the foregoing instruction on the ground that said instruction contains a correct statement of the law applicable to the case.

Assignment sixtieth. That said district court erred in refusing at the close of the evidence in overruling a motion made by the defendant's counsel to direct the jury to find a verdict of not guilty.

Assignment sixty-first. That said district court erred in rendering judgment and sentence in the manner and form aforesaid, because the verdict aforesaid is not supported by any sufficient evidence.

Because of these said several errors and other errors apparent on the face of the record here, the said defendant prays that the judgment of the said court may be reviewed and reversed. And the defendant will ever pray, etc.

WILLIAM S. FORREST,
Attorney for Defendant.

241 Endorsed: Filed February 28th, 1896. T. C. MacMillan, clerk.

On the same day, to wit, the 28th day of February, A. D. 1896, came the said defendant, by his solicitor, and filed in the clerk's office of said court his petition for a writ of error; which said petition is in the words and figures following, to wit:

242 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the United States District Court Thereof, Northern Division, December Term, A. D. 1895.

THE UNITED STATES OF AMERICA
vs.
JOSEPH R. DUNLOP. } Indictment.

To the honorable the judge of the said district court:

Your petitioner, Joseph R. Dunlop, respectfully represents unto your honor that he was convicted at the said December term of the said district court of an infamous crime, and upon said conviction sentenced to the penitentiary for the term of two years and to pay a fine of two thousand dollars and the costs.

Your petitioner prays that the court here will grant to petitioner the writ of error to the said district court, returnable to the next term of the Supreme Court of the United States; that the said writ of error may be made a supersedeas and your petitioner admitted to bail, pending the hearing of the same, and that said judgment of the district court may be reviewed and reversed.

Your petitioner will ever pray, etc.

WILLIAM S. FORREST,
Attorney for Defendant.

Endorsed: Filed Feb. 28, 1896. T. C. MacMillan, clerk.

243 Afterwards, to wit, on the 28th day of February, A. D. 1896, in the December term, 1895, of said court, in the record of the proceedings of said court in said entitled cause—the Honorable Peter S. Grosscup, judge of said court, presents and presiding—appears the following entry, to wit:

THE UNITED STATES
vs. } 2574. § 3893. Vio. Postal Laws.
JOSEPH R. DUNLOP.

Comes the defendant, by his attorney, and presents to the court his assignment of errors and a petition praying for a writ of error in this cause, and, upon motion of defendant's counsel, it is ordered by the court that said defendant be, and he is hereby, allowed a writ of error in said cause from the Supreme Court of the United States to this court, and that said writ of error issue without prejudice to the said plaintiff in error to move hereafter for supersedeas and bail herein.

On the same day, to wit, the 28th day of February, A. D. 1896, there was filed in the clerk's office of said court in said entitled cause a bond on writ of error; which said bond is in the words and figures following, to wit:

244 Know all men by these presents that we, Joseph R. Dunlop, as principal, and William S. Forrest and Benjamin C. Bachrach, as sureties, are held and firmly bound unto the United States in the full and just sum of two hundred and fifty dollars, to be paid to the said United States, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a term of the district court of the United States in and for the northern division of the northern district Illinois, in a suit depending in said court between the United States and said Joseph R. Dunlop a judgment was rendered against the said Joseph R. Dunlop, and the said Joseph R. Dunlop having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Joseph R. Dunlop shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then

the above obligation to be void; else to remain in full force and virtue.

JOSEPH R. DUNLOP. [SEAL.]
WILLIAM S. FORREST. [SEAL.]
BENJAMIN C. BACHRACH. [SEAL.]

Sealed and delivered in presence of—
CHARLES A. BUELL.
CHARLES R. PICKARD.
JOHN A. LOGAN.

Approved by—
P. S. GROSSCUP,
District Judge Nor. Dist. Illinois
Court of the United States.

Endorsed: Filed February 28th, A. D. 1896. T. C. MacMillan, clerk.

245 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

I, T. C. MacMillan, clerk of the district court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court, in the cause wherein The United States is the plaintiff and Joseph R. Dunlop is defendant, as the same appears from the records and files of said court now remaining in my custody and control.

Seal of Dist. Court U. S., Northern Dist. Illinois. 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 29th day of February, A. D. 1896.

T. C. MACMILLAN, *Clerk.*

246 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The United States, plaintiff, and Joseph R. Dunlop, defendant, a manifest error hath happened, to the great damage of the said Joseph R. Dunlop, defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the

same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

Seal of Dist. Court U. S., Northern Dist. Illinois. 1855.

T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern Dist. of Illinois.

Allowed by—
P. S. GROSSCUP,
District Judge.

[Endorsed:] Supreme Court of the United States. Joseph R. Dunlop, plaintiff in error, *vs.* The United States, defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S. district court, northern district of Illinois.

247 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the northern district of Illinois, wherein Joseph R. Dunlop is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable P. S. Grosscup, judge of the district court of the United States, nor. dist. Illinois, this twenty-eighth day of February, in the year of our Lord one thousand eight hundred and ninety-six.

P. S. GROSSCUP,
District Judge.

I accept service of this citation this 29th day of February, A. D. 1896.

JOHN C. BLACK,
United States Attorney.

248 [Endorsed:] Supreme Court of the United States. Joseph R. Dunlop, plaintiff in error, *vs.* The United States, defendant in error. Citation.

Let said writ of error operate as a supersedeas, and let the plaintiff in error, Joseph R. Dunlop, be admitted to bail on furnishing a bond in the sum of ten thousand dollars, said bond to be conditioned according to law, and the sufficiency of said bond to be subject to the approval of the district judge.

H. B. BROWN,
Associate Justice.

[Endorsed:] Joseph R. Dunlop, plaintiff in error, *vs.* The United States, defendant in error.

Endorsed on cover: Case No. 16,232. N. Illinois D. C. U. S. Term No., 942. Joseph R. Dunlop, plaintiff in error, *vs.* The United States. Filed March 19, 1896.

03486

Supreme Court, U. S.
FILED
MAR 30 1896
JAMES H. McKENNEY,
CLERK

165-486

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOSEPH R. DUNLOP, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 942.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOSEPH R. DUNLOP, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 942.

MOTION TO ADVANCE.

The plaintiff in error was indicted in the district court of the United States for the northern district of Illinois for having deposited in the mails copies of a newspaper (the Chicago Dispatch) containing advertisements claimed to be obscene, etc., in violation of section 3893 of the Revised Statutes. He was tried, and on February 4 last found guilty and sentenced to imprisonment in the penitentiary at Joliet for two years at hard labor, and to pay a fine of $2,000 and costs. He is now at large on bail in the sum of $10,000 pending the decision of this court on his writ of error.

The Solicitor-General respectfully moves the court to advance the case on the docket for hearing on such day as may be convenient to the court. The prominence of the defendant, the notoriety of the offenses of which he

has been convicted, and the widespread interest of the community in which he lived in the case, make this a case which should be disposed of as promptly as possible. In order that the effect on the criminal classes of this conviction may not be lost by delay in the carrying out of the sentence imposed, should no error be found in the record, it is hoped that the court may see its way clear to advance the case for hearing at the present term.

Notice of this motion has been served on the counsel for the plaintiff in error and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

165-486

Office Supreme Court, U. S.
FILED.
APR 1 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

JOSEPH R. DUNLOP
vs.
THE UNITED STATES. } No. 942.

Response of Plaintiff in Error to the Motion of the Defendant to Advance the Case.

We had no connection with this case until about 12 m. of the 28th inst., and saw nothing of the motion to advance until some three hours later, and of course our examination of the motion and the record in the case has been quite limited.

It seems the case is one arising upon the act of Congress (R. S., 3893), providing for punishing persons for using the mails of the United States for the purpose of transmitting and disseminating *obscene, lewd, and lascivious* books, papers, etc. The charge is a grave one, requiring some thirty-two counts in an Indictment to present it in its true colors, but after due consideration, the prosecution deemed there were six counts that held the alleged offense up in its proper light, and elected to stand on them. A long trial was had, involving many serious questions on evidence and on the proper duty of the jury, and on the law of the case itself. Many exceptions were saved, and a long, and yet unprinted record, is here for inspection, showing Dunlop

was convicted, fined $2,000, and sentenced to two years' imprisonment. This solemn result was reached about the 4th of February last, and on a writ of error, granted by a Justice of this court, the record was lodged here on the 19th inst., and the case stands No. 942 on the docket.

This court has had, for the present term, unavoidably a gorge, amounting to a dropsical plethora of advanced cases, unusual indeed to the extent of having the court now, on regular call, at about No. 205, when at this time last year it was at about No. 260; and now we stand some six weeks only within the time when arguing cases for the term will be brought to a period, with one or two recesses to occur in the meanwhile. Justice under the law can not well be done in this case on any hearing that may be had within that time; especially as Mr. Forrest, the attorney for the accused in the trial court, and who expects and hopes to render service in the case here, can not now see that he can be present at a hearing at this term.

Entertaining, as we do, the idea that the court will determine this case upon the record, and it alone, after the examination we have had time to make of it, we fail to see anything in it indicating the prominence of the accused, or anything of a great public demand for the case to be settled as suggested in the motion to advance. These could not well affect this court in disposing of this motion, however true they may be. Each party must take his stand here on his due order and call, and the case is not of that general character and public importance that requires a preference or precedence on the docket; any case arising upon the criminal code of the nation can as well claim this as the case now in hand.

Besides, if an example is needed, as intimated by and in the motion, this court has already given out, 27th of January last, a lesson in general on this subject in *Rosen*

v. *U. S.*, and we have hardly had time to see, hear, and feel its effects, nor the effects of the powerful dissent in that case by Justices White and Shiras. In this case some other and different questions arise, and the court, with the utmost deference we insist, should not be hurried out of its propriety in getting at and disposing of them.

The motion seems to take it for granted there will be no error found in the proceedings; if this is to be so taken, an affirmance might be entered at once without the delay and labor of a hearing. But a very partial examination by the court of the record will show this presumption, if it be one, is rather lame and premature, for without attempting to call attention now to any errors alleged or assigned in the record, the court will, at an early stage of the investigation, be confronted with feverish if not splenetic language of the court below, in its charge to the jury, that will call vividly to mind language discountenanced by this court in the *Hickory* and *Allison* cases of recent adjudication here. This, however, will be but one of a good many close, delicate and sharp questions in the record to be met and disposed of by this court.

Dunlop is out upon large and good and sufficient bail, in amount five times the fine placed upon him, and there is not the slightest pretense that he will flee the realm and appear not when he is wanted.

Under the circumstances, therefore, with every possible respect, we submit, it would be an undue precipitancy on the part of the court to wrench this case thus summarily out of its place on the docket, and press it to a hearing at this late hour, as asked for in this motion, and we indulge the hope that it may not be done.

A. H. Garland and
R. C. Garland,
For Plaintiff in Error.

March 30, 1896.

165-486

165-486

Supreme Court, U. S.
FILED.
OCT 19 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

472.

JOSEPH R. DUNLOP,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

Error to the District Court for the Northern Division of the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

WILLIAM S. FORREST,
ATTORNEY FOR PLAINTIFF IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

JOSEPH R. DUNLOP,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

Error to the District Court for the Northern Division of the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

WILLIAM S. FORREST,
ATTORNEY FOR PLAINTIFF IN ERROR.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error was convicted of violating Section 3893 of the United States Revised Statutes and sentenced to pay a fine of $2,000, and to be imprisoned at hard labor in the penitentiary at Joliet, Illinois, for the period of two years. The writ of error has been made a supersedeas. The plaintiff in error is admitted to bail.

The indictment contains thirty-two counts. Prior to the trial, pursuant to an order of the court, Mr. John C. Black, the District Attorney, elected to proceed on counts numbered one, six, twelve, sixteen, twenty-six and thirty-two. (Rec., 20, 21.) The other counts of the indictment were quashed.

No evidence was offered in support of the first count. The five counts on which the trial proceeded charged separate and distinct violations of the statute.

Count six (Rec., 4), in substance, charges that at Chicago, in the State of Illinois, the plaintiff in error, Joseph R. Dunlop, on July 6, 1895, did deposit and cause to be deposited in the post-office at said Chicago, for mailing and delivery, a large number of copies, to wit: One hundred copies of a certain paper, print and publication, entitled "The Chicago Dispatch," one of which said copies was then and there directed to "Mr. Montgomery" at Chicago, aforesaid, and another to "R. M. Williams, box 801," at St. Louis, Missouri, and the rest to divers persons unknown; that each of said copies was a copy of

the five o'clock edition of said July 6th and contained on the eleventh page thereof, under the headings of "Personal" and "Baths," certain obscene, lewd, lascivious and indecent matters in print, of too great length and of too indecent character to be set out in the indictment.

The remaining four counts upon which the plaintiff in error was tried and found guilty, differ from the sixth count in two respects, namely, the days on which the offenses charged therein are alleged to have been committed and the dates of the Chicago Dispatch alleged to have been deposited for mailing and delivery.

Count twelve (Rec., 6) charges that the copies of the Chicago Dispatch deposited for mailing and delivery were of the five o'clock edition of July 27, 1895, and were deposited on said day.

Count sixteen (Rec., 8) charges that the copies of the Chicago Dispatch for mailing and delivery were of the five o'clock edition of August 10, 1895, and were deposited on said day.

Count twenty-six (Rec., 12) charges that the copies of the Chicago Dispatch deposited for mailing and delivery were of the five o'clock edition of September 14, 1895, and were deposited on said day.

Count thirty-two (Rec., 14) charges that the copies of the Chicago Dispatch deposited for mailing and delivery were of the five o'clock edition of October 19, 1895, and were deposited on said day.

The case was tried and the jury were charged on the following theory of the government:

That there was published in the city of Chicago, Illinois, during the year 1895, and the three years immediately prior thereto, a daily and weekly newspaper entitled The

Chicago Dispatch; that the plaintiff in error, Joseph R. Dunlop, was the publisher of said newspaper during said years; that copies of the Chicago Dispatch in large numbers were deposited in the Chicago post-office for mailing and delivery during said years, daily except Sunday; that the copies of the Chicago Dispatch described in the indictment as directed to "Mr. Montgomery" at Chicago, and the copies of the Chicago Dispatch described in the indictment as directed to "R. M. Williams, box 801," at St. Louis, Missouri, were deposited for mailing and delivery at the post-office in Chicago on the dates of said several copies; that all the copies of said Chicago Dispatch, so directed to said R. M. Williams and Mr. Montgomery, contained therein, under the headings of "Personal" and "Baths," certain advertisements that were obscene, lewd, lascivious and indecent; and that the plaintiff in error, by reason of being the publisher of said Chicago Dispatch, was liable for the alleged depositing in said post-office of said newspapers, so directed to said R. M. Williams and Mr. Montgomery,

The copies of the Chicago Dispatch, directed to R. M. Williams, that were admitted in evidence, are copies dated respectively, July 6, 1895, marked Government Exhibit 2, (Rec., 47, 72); July 27, 1895, marked Government Exhibit 3, (Rec., 47, 72, 73); August 10, 1895, marked Government Exhibit 4 (Rec., 47, 74); September 14, 1895, marked Government Exhibit 5 (Rec., 47, 75).

The copies of the Chicago Dispatch, directed to Mr. Montgomery, that were admitted in evidence, are copies dated respectively July 6, 1895, marked Government Exhibit 6 (Rec., 54, 76); September 14, 1895, marked Government Exhibit 7 (Rec., 55, 77); October 19, 1895, marked Government Exhibit 8, (Rec., 55, 78).

The errors relied upon concern the admission of improper evidence, including all the newspapers introduced, the refusal of the court at the close of the testimony for the government to direct a verdict of not guilty, prejudicial remarks by the district attorney in his argument to the jury, the giving of improper instructions to the jury, the refusal of proper instructions requested on behalf of the plaintiff in error, and also the refusal of the court, prior to the trial, to order the district attorney to file the printed matters alleged to be obscene, or copies of the same, in order to enable the plaintiff in error to demur to the indictment, on the ground that the matters in print therein, alleged to be obscene, are not obscene, and if they are, that they are not too obscene or too long to be set out in the indictment.

Before the plea of not guilty was entered, a petition was filed, by the plaintiff in error, in which he craved oyer of all and several the matters, alleged to be obscene, and in which the court was requested to order the district attorney to file a copy of the matters alleged to be obscene, in order, among other things, to enable him to demur to the indictment, on the ground that said matters were not obscene and, if they were, that they were not too obscene or of too great length to be set out in the indictment.

The prayer of petitioner was denied. This denial, it is claimed, was error. (Rec., 35, 37, 38, 93.)

The record discloses that the only testimony therein as to the depositing in the mails of the newspapers alleged to contain the obscene matters was given by Robert W. McAfee and John A. Montgomery. Robert W. McAfee is the R. M. Williams and John A. Montgomery the Mr. Montgomery, named in the indictment.

Robert W. McAfee gave testimony (Rec., 38) tending to show that he had a conversation with the plaintiff in error on August 30, 1894, in which McAfee said that complaints had been made to the district attorney about the advertisements in the Chicago Dispatch under the headings of "Personal" and "Baths," and that he, McAfee, was directed by the district attorney to inform him, that newspapers were non-mailable, which contained advertisements susceptible of two interpretations, namely, that the houses advertised were legitimate or illegitimate, when the facts showed that they were illegitimate; that he was informed that investigations as to some of the places advertised in the Chicago Dispatch showed that the houses were illegitimate; that the plaintiff in error, Dunlop, replied that he had no desire to violate any of the postal laws, and did not intend to do so; that he scarcely ever saw the advertisements until after they had been published; that one of the employes received the advertisements, and that this employe had been recently instructed by him to scrutinize the advertisements with more care and to exclude those which were clearly objectionable; that on the following day, in response to a telephone message from Dunlop, he, McAfee, called upon Dunlop and discussed with Dunlop a number of advertisements in the Chicago Dispatch; that Dunlop then asked him how he could tell what advertisements were mailable and what were not; that he, McAfee, said that he was prohibited from applying the postal laws to any specific cases, and then quoted to Dunlop the postal laws and such rulings on the subject as he had at hand, and suggested that Dunlop should be sure he was right before he went ahead; that Dunlop replied that that was a good suggestion; that he and Dunlop had a subsequent

conversation (Rec., 39) in which he informed Mr. Dunlop that they were receiving a great many complaints and threats around the post-office about the advertisements in the Dispatch, and that it was only a question of time when the matter would be brought to the attention of the court; that Dunlop replied, much as he did before, that it was his desire to keep the matter right; that he was publishing a metropolitan paper, and that all these things were phases of metropolitan life, and that he did not see where to draw the line.

McAfee further testified that the only means he had of knowing who was the publisher of the Dispatch was from its appearance.

Thereupon the court admitted in evidence, under the offer of the district attorney, certain portions of the first columns of the editorial pages of certain papers, purporting to be copies of the Chicago Dispatch, each of which contained at the head of the first column of the editorial page therein the following two lines :—

"The Dispatch,

By Joseph R. Dunlop,"

for the purpose of showing who was the responsible editor of that paper. It was error, it is contended, to admit in evidence those portions of those papers. (Rec., 40–46, 94–99.)

The dates of said last mentioned papers are December 3, 1894, and the dates of the government exhibits numbered 2, 3, 4, 5, 6, 7 and 8. Said exhibits, it will be noticed, contain the matters alleged to be obscene.

Robert W. McAfee further testified on direct examination (Rec., 47) that on June 12, 1895, he sent the follow-

ing letter to the Dispatch of Chicago, and enclosed therein the sum of one dollar and twenty-five cents:

"ST. LOUIS, MO., June 12, 1895.

The Dispatch, Chicago, Illinois:

Send Dispatch to R. M. Williams, box 801, St. Louis, Missouri, for three months from date; $1.25 enclosed.

Yours truly,

R. M. WILLIAMS."

that after sending the letter the paper *was delivered to him regularly under the name R. M. Williams, in his box, 801, in the St. Louis post-office;* that each of the four copies of the Chicago Dispatch, dated July 6, 1895, July 27, 1895, August 10, 1895, September 14, 1895, was received by him in box 801 in the St. Louis post-office, *and that he received each of said copies by mail;* that he could not give the dates on which he received those papers, because he was away from the office in St. Louis sometimes for a week; that when he got back to St. Louis the papers would be in his mail; that there was no postal mark on them.

The foregoing was the substance of the testimony given by Robert W. McAfee on his direct examination.

The court will notice that in the testimony above set out Robert W. McAfee unequivocally testified, in his direct examination, that the papers identified by him were received by him in his box, 801, at the post-office at St. Louis, Missouri, and that the number of his box was 801. His cross-examination disclosed (Rec., 47) that he did not take or receive said several papers, identified and marked as above stated, from box 801 in the St. Louis post-office, but from a private box or desk, which he, the witness, had in the inspector's office in the post-

office building at St. Louis; that box 801 in the St. Louis post-office, if there is such a box, is not his box; that he had no box having a number in the post-office at St. Louis, and that the box he has in the inspector's office has thereon a label containing his name but no number; that in said box in the inspector's office he received all his mail; that his mail was put there by a messenger from the inspector's office; that he knew that the papers identified and marked as above came from the mails, only because he found them in his private box in the inspector's office; that his box in the inspector's office is not a post-office box; that, when the district attorney put to him the question, on direct examination, "Did you receive those papers through the mail?" he thought he knew what he meant (Rec., 49); that he answered that question candidly when he said that he received those papers through the mails, but that he did not say in his answers, on direct examination, that he received them through the mails, personally; that he did not omit the word "personal" from his answer so as to give the jury the impression that he did receive them personally; that his last conversation with Joseph R. Dunlop may have been four months prior to June, 1895; that he could not say positively that it was not as long previous to June, 1895, as January, 1895; that he is not in the employ of the government; that he does not draw any salary from the government; that he has a commission from the government as United States Inspector; that he is an agent of the Society for the Prevention of Vice, is paid by that society, and that he was such agent before he became United States Inspector.

On the day after McAfee gave the foregoing testimony he was recalled by the government and testified (Rec.,

49) that, subsequently to mailing the letter above set forth, he received from the Chicago Dispatch the following letter:

"THE CHICAGO DISPATCH,
By Joseph R. Dunlop. Herman J. Huiscamp, Treasurer.
115–117 Fifth Avenue, Chicago.
CHICAGO, September 15, 1895.

Mr. R. M. Williams,
Box 801, St. Louis, Missouri.

DEAR SIR:—Your subscription for THE DISPATCH expires August 13, 1895. Kindly advise if you wish the paper continued and oblige,

Very truly yours,
JOSEPH R. DUNLOP.
E."

Thereupon the district attorney asked McAfee the following question (Rec., 50):

"What was this messenger who delivered those papers?"

For the purpose of showing that the messenger was an officer in the employ of the government, whose business it was to deliver the mail to the inspector's office at St. Louis and that it was a part of the regular post-office department. Counsel for the defendant objected to the question on the ground, that the testimony of McAfee disclosed that he did not know who put the papers in his box in the inspector's office except from hearsay and rumor, and that McAfee was not present when the papers were put in the box.

Thereupon the court, without ruling on the objection, questioned the witness (Rec., 50) and learned from him that the messenger was not a letter carrier; that the messenger's business was, among other things, to gather mail for the inspectors and distribute it in a box provided in the

post-office, and that the witness was not present, when the papers were put in the box in the inspector's office.

Then the court remarked that, inasmuch as the witness did not see the messenger put the papers in the box, he did not see how it helped the case of the government. To which remark the district attorney replied, that he proposed to prove "that this was the universal custom and duty of the messenger." Then the court ruled, against the objection of counsel for plaintiff in error, that he should permit the government to show what the duty of the messenger was.

This ruling, it is contended, is error. (Rec, 51, 100.)

Thereupon Mc Afee testified, in response to questions put by the district attorney, that the title of the messenger is chief clerk of the inspector's office; that then (there was) another clerk whose business it was to go to the box department and gather all the mail for the inspectors and bring it to the inspector's office and distribute it there as the box clerks do down below; that he did not carry the mail for the public at all; that he only carried mail for the accommodation of the inspectors and officers of the post-office; and that it is his duty to bring the mail up into the inspector's office and put it into the box provided by the government for each inspector's mail.

Thereupon the court said (Rec., 51, 52):

"That presents a very nice question of law, as to whether that is in the mail when the inspector has it or is not in the mail. The mail is for the public. You have got that fact now. I will pass on that later."

The foregoing is all the testimony in the record as to depositing in the mails of government exhibits numbered 2, 3, 4 and 5.

John A. Montgomery testified (Rec., 54), on behalf of the government, that he was then and had been during the six years last past superintendent of the mails at the Chicago post-office; that he was familiar with the fact that there was such a publication passing through the Chicago post-office as the Chicago Dispatch.

Thereupon a motion was made by counsel for plaintiff in error to exclude the statement of the witness that there was such a publication passing through the Chicago post-office as the Chicago Dispatch.

The motion was overruled, and counsel for plaintiff in error excepted. (Rec., 54, 101.)

Then the witness was asked by the district attorney how long that publication had been passing through the post-office, and the witness, over the objection and exception of counsel for plaintiff in error was permitted by the court to answer that that publication had been going through the Chicago post-office during the past three or four years. (Rec., 54, 101.)

Montgomery further testified that a certain paper purporting to be a copy of the five o'clock edition of the Chicago Dispatch, dated July 6, 1895, was received by him in the Chicago post-office on the 6th day of July, 1895; that he received it from what is known as the round table, the place at which the mail comes into the office from the platform, where it is received direct from the publication office.

A motion by the counsel for plaintiff in error was made and overruled to exclude from the evidence the following statement of the witness: "Where it is received direct from the publication office." To this ruling an exception was saved by counsel for Dunlop. (Rec., 54, 101.)

Witness Montgomery further testified that the paper, dated July 6, 1895, was delivered to him through the regular channels of the mails in the same manner that all other papers of this kind are delivered; that another paper purporting to be a copy of the Chicago Dispatch for September 14, 1895, was delivered to him by the usual and ordinary channels of the United States mails, September 14, 1895, and came to him from the round table at which the mails are regularly delivered to the Chicago post-office, and that a third paper, which is dated October 19, 1895, was delivered to him through the regular channels of the mail from the round table in the post-office, (Rec., 55); that he received all the morning and evening papers in this way, with his name on them.

Montgomery further testified (Rec., 55,) that within the past year he had said to the plaintiff in error, "Mr. Dunlop, if I were you I would not publish that kind of a paper;" that Dunlop replied, "Mr. Montgomery, no other paper has made the success this one has, and it is only by this means that it has been possible to build the paper up in the short time that I have built it up."

Then the witness was asked (Rec., 55) whether the publication called the Chicago Dispatch was passing regularly through the mails for the six months preceding the months of July, August, September or October of last year and, over the objection and exception of counsel for the plaintiff in error, was permitted to answer that it was regularly received, and that the paper that does not go regularly is suspended at once. (Rec., 56, 101.)

Montgomery further testified (Rec., 57) that the mails from all the afternoon publications are received in sacks on a platform at the Jackson street front of the Chicago post-office, and taken from there to the scales, where the

sacks containing those publications are weighed; that the sacks containing the publications are taken thence to what is termed the round table; that the sacks are opened on the round table and that then the papers are taken therefrom and distributed into pouches, which are sealed and sent out on the various trains to the destinations indicated by the publishers; that during the past two years the second-class mail has not been received at the Chicago post-office in any other way.

Thereupon the witness was asked, whether the Chicago Dispatch had been so received during all that time (the past two years) and was permitted by the court, over the objection and exception of counsel for the plaintiff in error, to answer that it was. (Rec., 57.)

Montgomery further testified that, when a number of papers are sent to a single city, they are done up invariably in what is called a club package; that all the papers going to a given town are frequently put by the publisher in one parcel, and that around the whole parcel is a wrapper with the address of the place on the outside; that when the parcel reaches its destination the wrapper is torn and the papers are distributed to their several addresses.

The foregoing is the substance of the testimony given by Montgomery in his examination in chief.

On cross examination Montgomery testified (Rec., 57) that he received the papers, identified by him during his direct examination and marked, as stated above, at his desk in room 1 on the west side of the post office building; that the round table is not in his office in said room 1, but is in a room at the south end of the post-office building and in the center thereof; that there are five

partitions and five doors between the room, wherein he received all the copies of the Chicago Dispatch, identified by him, and the room which contains the round table; that he received each of said copies at his office, that is at room 1, from one of the employes at the round table or from the messenger; that he knows that he received the copy dated July 6, 1895, from the messenger of his office or one of the employes at the round table, because he saw him bring the paper; that, presumably, the man that brought that paper got it at the round table; that he knew he got it there because he knew he could not get it at any other place; that he did not see him get it there; that the man did not need to tell him that he got it there; that he received all the papers identified by him and about which he has given testimony, in the same way that he received the paper dated July 6, 1895; that he was positive that all the papers that he had identified came from the round table, because he received them from an employe of the post-office, and in accordance with the usual custom in the post-office those papers would have to come from that round table; that he does not know that he saw any one of them on the round table; that he does not know the names of the persons that brought those papers to his office; that he is positive that he received the papers that he identified from the round table because of the system prevailing in the post-office in Chicago, which makes it impossible for the papers to come to him through other sources.

On re-direct examination, the witness Montgomery testified)Rec., 60) that room 1, the office of the witness, is the first office to the south side of the Clark street entrance; that it is part of the post-office; that the person who brought these papers, identified by him, to his

office is not known as a letter-carrier or as a mail-carrier ; that he is a man, hired by the government to do any work he is directed to do ; that those papers were delivered to him in his office by two boys ; that Roy is the first name of one of those boys, whose surname he has forgotten, and that the surname of the other was Anderson, and that he did not know the first name of Anderson; that the man at the round table delivered those papers to him part of the time ; that sometimes those papers were delivered to him by one man and sometimes by another ; that, as a rule, they were delivered to him by the messenger ; that the duties of the messenger are to run errands and do things that are assigned him ; that he is a general office boy and a regular employe of the post-office, detailed as a messenger of his office.

Thereupon (Rec., 60) the witness was asked what are the duties of that messenger, and was permitted by the court, over the objection and exception of counsel for plaintiff in error (Rec., 60), to answer that, in a general way, his duty is anything we tell him to do, and that he has certain fixed things to do that he does every day, including this (namely, to bring to room 1 such papers as the witness testified he receive therein). The witness further testified that the duties of this messenger are defined by the witness and not by the post-office department.

The papers, identified by McAfee and Montgomery, namely government exhibits numbered 2, 3, 4, 5, 6, 7 and 8, were received in evidence after all the evidence for the government, except said exhibits, had been closed.

Thomas M. Beatty was called as a witness by the government and testified (Rec., 61), over the objection and

exception of counsel for plaintiff in error, that the number of newspapers of all classes published in Chicago from October, 1892, to the time of the trial was about six hundred.

Francis A. Morse testified on behalf of the government (Rec., 61) that he had been a receiving clerk in the mailing division of the Chicago post-office during the two years last past; that in the performance of his duties he stands on a platform on the outside of the post-office at the Jackson street entrance; that he was so engaged during the summer of 1895, being absent from his post, however, on July 29, and August 14; that he kept memoranda of the work done by him at his desk; that he made the memoranda on the day that he received the stuff; that the memoranda, held in his hand, were made by him on the dates there on written, namely July 6, July 27, September 14 and October 19, in the year 1895; that it was his duty to make these memoranda, in order that the proper clerk might know how to charge for the postage of the newspapers; that when the mail is brought, it is customary to set down the number of pounds (Rec., 62); that these memoranda he takes down to the weigh-room and gives them to the clerk in the weigh-room; that he made all these memoranda accurately.

Thereupon the witness was asked whether he had any independent knowledge that the Dispatch was delivered to him during the period embraced by the months of July, August, September and October, 1895; and the witness, over the objection of counsel for the plaintiff in error (Rec., 62), was permitted to answer that he knew by the cart marked "Chicago Dispatch," which drove up and unloaded there; that, if it happened to be unloaded when he was not there, he would examine the

bags, and would see "Chicago Dispatch" on them so as to charge it to the right parties.

The memoranda, identified by Morse, *supra*, are marked as follows:

Memorandum dated July 6, 1895, is marked Government Exhibit 9.

Memorandum dated July 27, 1895, is marked Government Exhibit 10.

Memorandum dated September 14, 1895, is marked Government Exhibit 11.

Memorandum dated October 19, 1895, is marked Government Exhibit 12.

These exhibits are memoranda of second-class mail weighed on the platform of the Chicago post-office on July 6, 1895, July 27, 1895, September 14, 1895, and October 19, 1895, the dates of all the papers except the one of August 10, 1895, admitted in evidence, as containing the obscene matters. Each of these memoranda contains in the first column thereof the names of seventeen publications, in the second, the number of the sacks of mail received on the date thereof, and in the third, the gross weight of the mail.

These memoranda show that at the Chicago Post Office there were received on July 6, 1895, two sacks of mail of a publication called Dispatch, weighing 130 pounds, on July 27, 1895, two sacks of mail weighing 150 pounds, on September 14, 1895, two sacks of mail weighing 141 pounds, and on October 19, 1895, three sacks of mail weighing 160 pounds.

Government Exhibit 13 (Rec., 66) shows that at the Chicago Post Office there were received on August 10, 1895,

two sacks of mail of a publication called Dispatch weighing 100 pounds.

The testimony as to exhibit 13 was given by J. J. Burke (Rec., 65), and is substantially like the testimony given by Morse, *supra*.

The admission of government exhibits 9, 10, 11, 12 and 13, it is claimed, is error. (Rec., 62 to 66, inclusive, and 103 to 107, inclusive.)

Walter C. Henry testified on behalf of the government, (Rec., 66) that he had been a record clerk in the Chicago Post Office for five or six years; that as such clerk it is his duty to make a record of all the second-class mail received; that he does not weigh the mail, but he makes a bill for the second-class mail received; that the memoranda, held in his hand, were made by him on the dates thereon written, namely, July 6, September 14 and October 19, in the year 1895; that these memoranda concerned the daily Chicago Dispatch; that the data upon these memoranda he obtained from the weigher in the Chicago postoffice.

Said memoranda, dated July 6, 1895, is marked Government Exhibit 14.

Said memoranda, dated September 14, 1895, is marked Government Exhibit 15.

Said memoranda, dated October 19, 1895, is marked Government Exhibit 16.

Said memoranda were admitted in evidence. In this there was error, it is claimed. (Rec., 67, 68, 69, 108, 109, 110.)

These government exhibits numbered 14, 15 and 16, show the net weights of the mail received at the Chicago

post-office from the Dispatch on the dates thereof, said dates being the dates of three copies of The Chicago Dispatch, alleged to contain the obscene matters, and the amounts of postage due.

T. Ohlander testified on behalf of the government (Rec., 69) that during the year last past he was the distributer in the Chicago post-office; that it is his duty to place the mail in the different sacks or pouches; that the mail is received at the round table and thence dispatched on the different railway trains; that he knows about the receipt of the Chicago Dispatch at the Chicago post-office during the last year; that he was on duty as mail distributer from July 1, 1895, to October 1, 1895.

The witness was asked to state whether on each and all of these days he received the paper called the Chicago Dispatch at the post-office, and over the objection of counsel for plaintiff in error, was permitted by the court to answer that he did receive it.

Then the court asked the witness whether he remembered having received The Dispatch at that place every day, during that period, and over the objection and exception of counsel for plaintiff in error was permitted to answer "Yes, that he may say that he did."

These rulings, it is claimed, are error. (Rec., 69, 70, 110.)

On cross-examination Ohlander testified (Rec., 70) that he could not tell whether he at any time received as such distributer The Chicago Dispatch dated July 6, 1895, or July 27, 1895, or August 10, 1895, or September 14, 1895, or October 19, 1895; that all he knows about the matter is that he usually received The Dispatch.

Walter S. Meyer testified (Rec., 70) for the government that he and the witness Robert W. McAfee had a conversation with the plaintiff in error, Mr. Dunlop, with regard to the publication of The Chicago Dispatch in August, 1894, and that in said conversation Mr. Dunlop said he was the publisher, proprietor and responsible head of the Dispatch, and that he and McAfee discussed with Mr. Dunlop the advertisements in that paper concerning "baths" and "massage" and "personal" items; that he read one of them to Dunlop and that he (Dunlop) said he did not know that it was there, and as to the others, he said he would let us understand that this advertising was put in the paper by his direction, through his advertising man.

W. R. Chamberlain, testified (Rec., 71) on behalf of the government that he is an attorney at law, and that he had a conversation with the plaintiff in error in December, 1895, in which the plaintiff in error informed the witness that he was the owner, editor and proprietor of the Dispatch.

Washington Hesing testified (Rec., 53) that he had conversations with Joseph R. Dunlop in the Dispatch office at 115-117 Fifth avenue; that he knows of no other Joseph R. Dunlop connected with the newspaper business than the defendant.

H. H. Kohlsaat testified (Rec., 60) that the plaintiff in error called on him in relation to leasing the basement of the Post building for the publication of the Dispatch and asked him if he (witness) would lease the building to him and that witness replied that he had not decided what to do with the building.

Thereupon government exhibits numbered 2, 3, 4, 5,

6, 7 and 8, identified by the witnesses McAfee and Montgomery, were admitted in evidence for the purpose of showing that they were deposited in the Chicago post-office for mailing and that the matter contained therein was obscene, lewd, lascivious and indecent. Counsel for plaintiff in error objected to the reception in evidence of those government exhibits.

In support of this objection, it was urged, as to each of those exhibits, that the evidence failed to show that it was deposited in the post-office at Chicago for mailing, or that it is a copy of the Chicago Dispatch, or that it is a copy of the paper described in any of the counts in the indictment as the Chicago Dispatch; that the evidence showed that said paper is not the paper described in any of the counts of the indictment, because it does not, under the headings "Personal" and "Baths" contain matter that is too long, or too indecent to be set out in the indictment; that there is a variance between it and every count of the indictment, because the printed matter therein is not too long, or too indecent to be set out in the indictment; that said paper does not tend to support the allegations in any count of the indictment, because the columns thereof, headed "Personal" and "Baths" are not too long, or too indecent to be set out in the indictment. (Bill of Exceptions, Rec., 72 to 78, inclusive, and Assignment of Errors, Rec., 110 to 115, inclusive.)

A motion to direct a verdict of not guilty, made by counsel for plaintiff in error after the government rested, was denied by the court.

This ruling, it is insisted, was error. (Bill of Exceptions, Rec., 78; Assignment of Errors 23, Rec., 115.)

Other errors arose, it is claimed, from language used by the district attorney in his argument to the jury, and from rulings thereon made by the court. (Rec., 79, 80.)

It is insisted that the charge of the court contains instructions as to the law, and directions as to the application and consideration of the evidence, that are clearly erroneous; that said charge, among other things, did not correctly define the test of what is obscene matter, and cast upon the defendant the burden of establishing a reasonable doubt, and of proving his innocence; that said charge also improperly directed the jury to consider evidence that was incompetent, misleading and highly prejudicial to the plaintiff in error, and directed the jury that they might depart from the rules of law and decide the issues according to the suggestions of common sense.

It is further insisted that errors arose from the refusal of certain instructions, requested on behalf of the plaintiff in error.

Specification of Errors.

The assignment of errors in the record numbers sixty-one. This large number results from the number of documents admitted, each document being the basis of one assignment, and the repetition of the same error in the re-reception of evidence. In the specification of the errors which follows, they are, as far as possible, classified according to the rule departed from or the principle violated.

1. Seven assignments of error concern the admission in evidence of the following two lines:

"The Dispatch,
By Joseph R. Dunlop,"

taken from the first column of the editorial page of each

one of seven papers, purporting to be copies of the Chicago Dispatch, respectively, for December 3, 1894, July 6, 1895, July 27, 1895, August 10, 1895, September 14, 1895, and October 19, 1895. (Assignment of Errors, 2, 3, 4, 5, 6 and 7, Rec., 94 to 99, inclusive.)

The objection to the admission of said two lines in evidence is, that there is no proof that the newspapers from which they were taken are copies of the Chicago Dispatch, and that they do not tend to show who was the publisher of said Dispatch.

2. McAfee testified, on cross-examination, that exhibits 2, 3, 4 and 5, which are cuttings from all the newspapers identified by him, in which it is claimed there is obscene matter, he took, not from the mails and from post-office box 801, as he stated on direct examination, but from his private box, which was located, not in the post-office, but in the inspector's office, in the post-office building, at St. Louis, Missouri; that he was not present when said newspapers were deposited in that private box, and does not, of his own knowledge, know by whom they were deposited therein.

In order to show that all these exhibits came from the mails through the post-office at St. Louis, the court permitted the government to prove by McAfee, on his redirect examination, that there was, in the employ of the government and attached to that inspector's office, a messenger, whose title was chief clerk; that there was another clerk whose business it was to go to the box department in the St. Louis post-office, gather up all the mail for the inspectors and distribute it in the inspector's office; that this messenger or clerk was not a mail-carrier, but was merely a clerk in the inspector's office.

The gist of the objection to this testimony is the assumption, that the exhibits were deposited in the private box of McAfee, in the inspector's office, by the clerk or messenger, attached thereto. The admission of this testimony permitted the jury to infer therefrom that all the exhibits enumerated above came from the mails through the St. Louis post-office. (Assignment of errors, 8; Rec., 99.)

In the charge the court instructed the jury that such an inference might be drawn from this testimony. (Rec., 117.)

An error, similar to the one just stated, was committed by the court in permitting the government to prove by witness Montgomery, that the duties of a certain messenger, not a mail-carrier, attached to his office in the Chicago post-office building, were, among other things, to bring to said office the newspapers identified by him. (Assignment of Errors, 13; Rec., 102.)

3. The court erred in permitting the government to prove by the witness Montgomery, that such a publication as the Chicago Dispatch was passing through the post-office; that the Chicago Dispatch had been passing through the Chicago post-office, regularly, during the three or four years last past; that the Chicago Dispatch passed regularly through the mails for six months preceding the period of July, August, September and October of last year (1895); that a paper which does not go through the post-office regularly is suspended at once, and that the Chicago Dispatch has been regularly received at the Chicago post-office during all that time, namely, the three years that immediately preceded the trial (Assignment of Errors 9 and 10, Rec., 101); and in permitting the government to prove by the witness, Morse, that he had

knowledge, independent of his record, that the Dispatch was regularly received at the Chicago post-office during the period embraced by the months of July, August, September and October, 1895 (Assignment of Errors 15; Rec., 102); and in permitting the government to prove by the witness Ohlander, that the Chicago Dispatch was received at the Chicago post-office every day during the period from July 1, 1895, to October 31, 1895 (Assignment of Errors 24; Rec., 110); and in admitting in evidence government exhibits numbered 9, 10, 11, 12, 13, 14, 15 and 16 (Assignment of Errors 16 to 23, inclusive, Rec., 102 to 110, inclusive).

These exhibits show that upwards of one hundred pounds of the Chicago Dispatch were received, as second-class mail, at the Chicago post-office, on July 6, July 27, August 10, September 14, and October 19, 1895, respectively, (the dates of the copies alleged to contain the obscene matter) the amount of postage due for said mail and the receipt of said postage from the Chicago Dispatch.

4. The court erred in permitting the government to prove by the witness Montgomery, that he received regularly all the morning and evening papers with his name on them in this way, that is, in the way in which he testified he received all the copies of the Chicago Dispatch from which are taken Government Exhibits marked 6, 7 and 8 (Assignment of Errors, 14; Rec., 102.)

5. The court erred in admitting in evidence exhibits numbered 2, 3, 4, 5, 6, 7 and 8. (Assignment of Errors, 25, 26, 27, 28, 29, 30 and 31; Rec., 111 to 115, inclusive.)

These exhibits are substantially copies of each other. Such of the advertisements in these exhibits as were re-

lied upon were marked by order of the court in blue lead-pencil during the argument to the jury. Those so marked are printed in the supplement to this brief. The objections made to all and several these exhibits are as follows:

1. The evidence fails to show that they were taken from copies of The Chicago Dispatch or that they were deposited in the post-office at Chicago for mailing.

2. They do not contain obscene matter.

3. There is a variance between them and the publications described in the indictment.

6. The court erred in refusing, at the close of the testimony, to direct a verdict of not guilty (Assignment of Errors 32, Rec., 115).

The grounds of this motion are that the evidence fails to show:

1. That any one of the goverment exhibits numbered 2, 3, 4, 5, 6, 7 and 8 was deposited in the Chicago post-office for mailing.

2. That any one of said exhibits is taken from a copy of The Chicago Dispatch.

3. That any one of said exhibits contains matter that is obscene. (Assignment of Errors 32, Rec., 115.)

7. The court erred in using the following language in the charge:

"The testimony of the government tends to show that with respect to the papers sent to Mr. McAfee, he, under the name of Williams, wrote to the Dispatch, in this city, asking them to send him the paper for a specified time and enclosing the subscription price for that period. This letter was written from St. Louis; that after that time he continued to receive the Dispatch. It was brought to his

office by his messenger, supposedly from the post-office, though he, himself, personally does not know." (Assignment of Errors 39, Rec., 117.)

Excepted to on the ground that there is no evidence that any one of said papers was brought to Mr. Afee's office by the messenger.

8. The court erred in using the following language in the charge:

"Now, the testimony of the government also tends to show that as a matter of fact, the Dispatch during this period was delivered at the round table for mailing purposes; that it was delivered there in considerable quantities and its weights taken by the weigher of the post-office department and reported to the clerk whose duty it was to record them." (Assignment of Errors 40, Rec., 117.)

An exception was saved to the use of the foregoing language on the ground that testimony referred to therein was improperly admitted.

9. The court erred in using the following language in the charge:

"So that you are at liberty to take all these facts together, consider them together, and if, upon that consideration as a whole, you have no reasonable doubt but what the Dispatch was deposited in the office, you are at liberty to find that it was so deposited, notwithstanding the fact that no witness saw it so deposited." (Assignment of Errors, 41; Rec., 117.)

An exception was saved to the use of the foregoiug language on the ground that it cast the burden of proof on the plaintiff in error.

10. The court erred in using the following language in the charge:

"If, on the other hand, with all these facts in mind, and giving to each its due credit in weighing the probabilities, if you can see some reasonable ground for believing of or doubting that these particular papers were

deposited in the post-office, you must give to the defendant the benefits of that doubt. It is your duty to come to a conclusion upon all those facts and the effect of all those facts the same as you would conscientiously come to a conclusion upon any other set of facts that come before you in life." (Assignment of Errors, 42; Rec., 117.)

An exception was saved to the use of the foregoing language on the ground that it cast upon the plaintiff in error the burden of proof, and permitted the jury to decide the issues without reference to the rules of law.

11. The court erred in using the following language in the charge:

"There is no technical rule, there is no limitation in courts of justice, that prevents you from applying to them" (the facts and circumstances of evidence) "just the same rules of good common sense—subject always, of course, to a conscientious exercise of that common sense—that you would apply to any other subject that came under your consideration, and that demanded your judgment." (Assignment of Errors, 43; Rec., 117.)

An exception was saved to the use of the foregoing language on the ground that it instructed the jury they might depart from the rules of law and base their verdict upon the rules of common sense.

12. The court erred in using the following language in the charge:

"If, after having done that, you have no reasonable doubt that these papers were deposited in the post-office, it is your duty to so find that fact. If you have, then, as I said before, give to the defendant the benefit of the doubt." (Assignment of Errors, 44; Rec., 118.)

An exception was saved to the use of the foregoing language on the ground that it cast the burden of proof upon the plaintiff in error.

13. The court erred in using the following language in the charge :

"That raises the question as to whether the defendant is the publisher of this paper or has such a connection with the paper that he must be held responsible as the publisher and deliverer of the paper. If the defendant holds such an office in the management of the Dispatch that whatever anybody else does with the Dispatch is under his guidance, with his assent, then he is responsible for that act just as much as if he had done it with his own hands. So you must ascertain from the evidence whether he is the publisher and whether, as such publisher, he knew that the paper was going through the post-office." (Assignment of Errors, 45; Rec., 118.)

An exception was saved to the use of the foregoing language, on the ground that it authorized the jury to conclude that the plaintiff in error delivered government exhibits 2, 3, 4, 5, 6, 7 and 8 to the mails from the fact, that the plaintiff in error was the publisher of them.

14. The court erred in using the following language in the charge :

"The paper itself introduced in evidence contains on one of its pages the statement that it is published by Joseph R. Dunlop, and, in response to an inquiry by the court of one of the witnesses, it was said that it was not known that there was any other Joseph R. Dunlop in the newspaper business in the city of Chicago." (Assignment of Errors, 46; Rec., 118.)

An exception was saved to the use of the foregoing language, on the ground that it authorized the jury to find that plaintiff in error was the publisher from evidence improperly admitted.

15. The court erred in using the following language in the charge:

"Now, taking these facts all together, is there any

reasonable doubt in your mind that the Joseph R. Dunlop on trial before you is the publisher of this paper, oris there any reasonable doubt in your mind that when these papers were deposited in the post-office, if they were so deposited, it was done with his assent or knowledge; if there is not, then it is your duty to find these facts in favor of the government. If there is, you must give, as I said before, to the defendant the benefit of that doubt." (Assignment of Errors, 47, Rec., 119.)

An exception was saved to the use of the foregoing language on the ground that it cast the burden of proof upon the plaintiff in error.

16. The court erred in using the following language in the charge:

"Now, what is an obscene, lascivious, lewd or indecent publication is largely a question of your own conscience and your own opinion; but it must come, before it can be said to be such literature or publication—it must come up to this point, that it must be calculated with the ordinary reader to deprave him—deprave his morals or lead to impure purposes." (Assignment of Errors, 48; Rec., 119.)

An exception was saved to the use of the foregoing language on the ground that it does not correctly state the test of what constitutes obscene, lewd, lascivious or indecent literature.

17. The court erred in using the following language in the charge:

"Now, reading these paragraphs (the advertisements in evidence) that counsel have called to your attention, and you will take them with you to your jury room, it is your duty to ascertain, in the first place, if they are calculated to deprave the morals; if they are calculated to lower that standard which we regard as essential to civilization; if they are calculated to excite those feelings which, in their proper

field, are all right, but which, transcending the limits of that proper field, play most of the mischief in the world. If they are, then they are obscene, lewd and lascivious, within the meaning of the statute. If not, then they are not so within the meaning of the statute." (Assignment of Errors 49; Rec., 119.)

An exception was saved to the use of the foregoing language on the ground that it does not correctly state the test of what is obscene, lewd, lascivious or indecent literature.

18. The court erred in refusing to give the jury the following instructions requested by counsel for plaintiff in error:

"The court instructs the jury that the presumption of innocence in this case is stronger than the presumption that the government employe who delivered the newspapers to Mr. Montgomery in the Chicago post-office building obtained said newspapers from the United States mails." (Assignment of Errors 50; Rec., 119.)

"The court instructs the jury that the presumption of innocence in this case is stronger than the presumption that the person who deposited the copies of the Chicago Dispatch in the box in the St. Louis post-office building, from which box the witness McAfee took said papers, obtained said newspapers from the United States mails." (Assignment of Errors 51; Rec., 120.)

"The court instructs the jury that the office of the witness, Mr. Montgomery, in the postoffice building, in the City of Chicago, is not a part of the postoffice within the meaning of the law upon which this indictment is based." (Assignment of Errors 52; Rec., 120.)

"The court instructs the jury that the place where the witness McAfee found certain newspapers in the city of St. Louis, Missouri, namely, the postoffice inspector's office, is not a part of the postoffice at St. Louis, within the meaning of the law upon which this indictment is based." (Assignment of Errors 53; Rec., 120.)

"The court instructs the jury that there is no evidence in this case tending to show that the newspapers containing the address of R. M. Williams came from or were taken from the post-office at St. Louis, Missouri." (Assignment of Errors 54; Rec., 120.)

"The court instructs the jury that if they believe from all the evidence in this case that it was in the power of the government to produce as witnesses in this case the persons who, it is claimed by the government, took the newspapers addressed to R. M. Williams from the post-office at St. Louis, or the newspapers addressed to Mr. Montgomery from the round table in the post-office in Chicago, then the jury are at liberty to draw the inference that the government officers conducting the prosecution believed or feared that the testimony of such witnesses, if produced, would not tend to support the theory of the prosecution in this case." (Assignment of Errors 55; Rec., 120–121).

"That in dealing with circumstantial evidence an inference from an inference is strictly forbidden, and that therefore the jury are not at liberty in this case to assume that the clerk in the post-office inspector's office at St. Louis, Missouri, did his duty, and then to infer from the assumed fact that said chief clerk did his duty, that said chief clerk took the newspapers addressed to R. M. Williams from the post-office at St. Louis, Missouri." (Assignment of Errors 56; Rec., 121.)

"And the jury are further instructed that they are not at liberty in this case to assume that the person or persons whose custom it was to bring the Chicago Dispatch to Mr. Montgomery followed that custom or did his or their duty and took the newspaper addressed to Mr. Montgomery from the so-called round table in the post-office at Chicago, Illinois, and then infer from the assumed fact that such person or persons so followed the usual custom or did their duty, that said newspapers were actually deposited in the post-office at Chicago, Illinois, for mailing." (Assignment of Errors 57; Rec., 121.)

"The court instructs the jury that any circumstance which is essential to a conclusion of guilt against the de-

fendant should be established beyond all reasonable doubt before it can be used by the jury against the defendant." (Assignment of Errors 58; Rec., 121.)

"The court instructs the jury that in order to justify the inference of guilt from circumstantial evidence the existence of the inculpatory facts must be inconsistent with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. If you can reconcile the facts in this case on any reasonable theory consistent with the innocence of the defendant, it is your duty to do so and to find the defendant not guilty." (Assignment of Errors 59; Rec., 121.)

Exceptions were saved, severally, to the refusal of the court to give said instructions to the jury on the ground that they each contained a correct statement of a rule of law applicable to the evidence.

19. Error intervened during the argument of the district attorney, to the jury, as follows:

In his argument the district attorney, Gen. Black, used the following language:

"I do not believe that there are twelve men that could be gathered by the venire of this court within the confines of the State of Illinois, except where they were bought and perjured in advance, whose verdict I would not be willing to take upon the question of the indecency, the lewdness, lasciviousness, licentiousness and wrong of those publications." (Assignment of Errors 35; Rec., 115, 116.)

When the attention of the court was called to the foregoing language, the court ruled that such language was improper, and the district attorney said: "I withdraw the language."

The district attorney in his argument to the jury made use of the following language:

"Now, gentlemen, it is not necessary for me to tell you what the massage treatment is—how a man is stripped naked from the sole of his feet to the crown of his head and rubbed with the hands—" (Assignment of Errors 37; Rec., 116.)

The counsel for plaintiff in error notified the court of an exception to the language of the district attorney, last above quoted, and called the court's attention thereto, and thereupon the following occurred between the court and counsel for plaintiff in error:

The Court: Well, I suppose massage, like walking, is so well known, that everybody knows what it is. I don't suppose there would be any harm in the district attorney stating what walking is." (Rec., 79.)

Counsel for plaintiff in error: "Certainly not."

The Court: "Then I do not think there is any impropriety in the district attorney stating what the massage treatment is." (Assignment of Errors 38; Rec., 116, 117.)

To the use of all the foregoing language and the rulings thereon by the court exceptions were taken.

20. The court erred in refusing to require the district attorney to file, prior to the plea of not guilty, copies of the printed matters alleged to be obscene.

The plaintiff in error by his counsel moved that such copies of said matters be filed, in order to enable him to demur to the indictment on the ground that those printed matters were not obscene, and, if they were, that they were not too obscene or too long to be set out in the indictment. (Bill of Exceptions; Rec., 37, 38; Assignment of Errors 1, Rec., 93.)

ARGUMENT.

I.

There was error in permitting the United States to prove by the witness, Robert W. McAfee, that it was among the duties of a certain clerk or messenger of the post-office inspector, whose office was somewhere in the post-office building at St. Louis, Missouri, to take the mail from the post-office at St. Louis, and distribute it in the private boxes of persons who had desk room in the said inspector's office. (Bill of exceptions; Rec., 47, 48, 49, 50, 51, 52; Assignment of Errors 8, Rec., 99, 100.)

II.

An error, similar to the foregoing error, was committed in permitting the witness, John A. Montgomery, to testify that it was among the duties of a government employe, not a mail carrier, daily to take from a table, called "the round table," in the mailing department of the Chicago post-office, a copy of the Chicago Dispatch, and to deliver the same to him, John A. Montgomery, in the office occupied by him, as superintendent of mails, in the government building at Chicago, and that it was in this way that the newspapers, identified by said Montgomery, were received by him.

(Bill of Exceptions; Rec., 60; Assignment of Errors 13, Rec., 102.)

It was error to permit the witness, Robert W. McAfee, so to testify as to the duties of said clerk or messenger, attached to the office of the post-office inspector at St. Louis, because there was no evidence in the record tend-

ing to show that any one of the copies of the Chicago Dispatch, identified by said McAfee, namely government exhibits numbered 2, 3, 4 and 5 (Bill of Exceptions, Rec., 47, 48, 49, 50, 51 and 52), had been deposited by said clerk or messenger where said McAfee found them, namely, in his private (not post-office) box in the office of the post-office inspector in the St. Louis post-office building at St. Louis.

The error consisted *in assuming that the copies of the papers, purporting to be The Chicago Dispatch*, which said McAfee testified he found in his private (not post-office) box in the said inspector's office at St. Louis, *were deposited in that private box by the clerk or messenger*, and then, in permitting McAfee to testify that it was the duty of the clerk or messenger to take the mail from the post-office and to distribute the same in certain private boxes in the inspector's office.

This testimony gave the jury an excuse to infer therefrom that the papers, identified by McAfee, came from the St. Louis post-office, and then further to infer from that last inference that those papers were deposited for mailing in the Chicago post-office.

It appears, therefore, that without that assumption, followed by the erroneous ruling as to the reception of the testimony of McAfee, the copies of the papers purporting to be copies of The Chicago Dispatch, marked respectively government exhibits 2, 3, 4 and 5, (Rec., 72, 73, 74, 75) there would have been no evidence warranting the court in admitting in evidence those exhibits. Had those exhibits been excluded, there would have been in evidence no publication, supposed to have been mailed, containing the matter alleged to be ob-

scene, unless the papers identified by witness John A. Montgomery were properly admitted in evidence.

Let me refer you, therefore, to the second error stated above, namely, the error committed in permitting the witness Montgomery to testify as to the duties of a messenger attached to his office, and also the duties of a certain government employe.

Montgomery testified in his direct examination, that the papers identified by him, government exhibits 6, 7 and 8, papers purporting to be copies of The Chicago Dispatch, had been received by and delivered to him (Montgomery) in the office of the superintendent of mails in the post-office building at Chicago; that those papers so came to him "through the regular channels of the mails"; that those papers came to him from "the round table," and that those papers were taken to "the round table" from the platform on which they were received direct from the publication office. (Bill of Exceptions; Rec., 54, 55, 56, 57.)

The cross-examination of Montgomery (Bill of Exceptions, Rec., 57, 58, 59) disclosed, that all that the witness Montgomery knew about the channel by which those papers (government exhibits 6, 7 and 8) came to him was that he received them in the office of the superintendent of mails, and that they were brought thither by one of two government employes, not mail carriers; that those employes, Montgomery *supposes*, took those papers from the "round table," on which "round table," Montgomery supposes, those papers had been placed after those papers, as Montgomery *supposes*, had been taken from the platform, on which publishers of second-class matter in Chicago deliver to the post-office

their publications. Then followed the re-direct examination of Montgomery, during which the witness was permitted to testify, after defendant's objection had been overruled and an exception taken, that it was the duty of the person, who delivered to his (Montgomery's) office government exhibits 6, 7 and 8, to take the papers, purporting to be copies of "The Chicago Dispatch" from the "round table," and deliver them to him at the office of the superintendent of mails.

The error claimed in the second point above specified is in all respects similar to the error pointed out in what has been urged respecting the genesis and nature of the error claimed in the first point above specified, namely, an assumption of the real fact in issue, followed by testimony as to the duties of the messenger. Thus the jury were left at liberty to assume a fact, draw an inference therefrom and then to draw a second inference from the first inference. The vicious circle is here complete.

Had not this second error been committed, there would have been in the evidence no testimony tending to show that exhibits 6, 7 and 8 had been deposited in the mails at Chicago.

Barring the testimony admitted under these two erroneous rulings there was no testimony before the court and jury that apparently justified the reception in evidence of government exhibits numbered 2, 3, 4, 5, 6, 7 and 8. Besides, had not the exhibits 2, 3, 4, 5, 6, 7 and 8, been admitted in evidence, the court would have been compelled to grant the motion of the defendant's counsel to direct a verdict of not guilty after the government rested.

The errors above indicated were committed during the

re-direct examinations of the witnesses McAfee and Montgomery.

McAfee and Montgomery, each on his direct examination, swore unequivocally that such copies of the paper purporting to be The Chicago Dispatch, as he identified were received by him through the United States mails.

McAfee went so far on his direct examination as to state positively that he received the copies of the papers identified by him from post-office box 801, at the St. Louis post-office. But on his cross-examination McAfee admitted, with the utmost reluctance, that he did not take or receive any of the papers identified by him from post-office box 801, but that he found them each and all in the office of the post-office inspector in St. Louis. And on his cross-examination Montgomery admitted that, of his own knowledge, he did not know that any one of the papers identified by him came to him through the United States mails, and that all he knew on that subject was that he received them in the office of the Superintendent of Mails at Chicago; and that he saw but one of the papers, identified by him, namely, exhibit 6, delivered at his office.

Hence the necessity of introducing the testimony objected to on the redirect examinations of McAfee and Montgomery. Had not the erroneous evidence been admitted the government's case would have failed.

It is respectfully suggested that the testimony of McAfee and Montgomery as to the matters above considered is indistinguishable from perjury.

III.

The court erred in permitting the government to prove, that during the three years preceding the trial and also during the period defined by the dates of the papers, admitted in evidence, namely from July 6, 1895, to October 19, 1895, a newspaper purporting to be the Chicago Dispatch was regularly, on each day except Sunday, received in great quantities at the Chicago post-office for mailing and delivery.

Testimony tending to show such a state of facts was given by the witnesses, Montgomery, Morse and Ohlander. This testimony was corroborated by government exhibits numbered 9, 10, 11, 12, 13, 14, 15 and 16. These exhibits show the weights of the copies of the Dispatch so received on July 6, July 27, August 10, September 14 and October 19, 1895 (these dates being the dates of the copies of the Chicago Dispatch alleged in the indictment to contain the obscene matters) and the amounts of postage collected from the Dispatch by the government.

This point concerns the 9th, 10th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22d, 23d and 24th assignment of errors. (Rec., 101 to 110 inclusive.) (Bill of Exceptions, Rec., 56, 57, 61, 62, 63, 64, 65, 66, 67, 68, 69.)

The object of the government in offering, and the trial court in admitting, the improper evidence, stated above, was to prove that on all and several the days of the months of July, August, September and October, 1895, on which dates the papers alleged to contain the obscene matters are claimed to have been deposited in

the Chicago post-office for mailing, large numbers of copies of a paper called the Chicago Dispatch, were actually received at the Chicago post-office for mailing, said copies not being the identical papers described in the indictment.

All the counts of the indictment, elected for trial, allege that the obscene matters were printed in the five o'clock edition of the Chicago Dispatch. The copies thereof offered in evidence as copies that were deposited for mailing and contained the obscene matters, are of the five o'clock edition. But of what edition the great numbers of copies of the Chicago Dispatch were that the government was permitted to prove by the witnesses Montgomery, Morse and Ohlander as well as by government exhibits numbered 9, 10, 11, 12, 13, 14, 15 and 16, were regularly received each day, except Sunday, at the Chicago post office, does not appear.

The fact, if it were a fact, that an indefinite number of the copies of the Chicago Dispatch were daily received at the Chicago post office does not tend, even remotely, to prove that a copy thereof directed to R. M. Williams, box 801, St. Louis, Missouri, or a copy thereof directed to Mr. Montgomery at Chicago was received. And yet, in effect, this testimony was as mischievous and as prejudicial as it would be to prove that the defendant was in the habit of horse stealing, if he were on trial for stealing a particular horse. When a jury discovers that the defendant is in the habit of doing the particular act with which he is charged in the indictment, they seldom fail to find that he did the particular act so charged, regardless of the evidence, unless directed by the court to find a verdict of not guilty.

I suggest that the following is a fair illustration of the error which I am now contending the court committed.

Suppose that the retail dry-goods firm of Marshall Field & Co., at Chicago, claimed that they sent, on a given day, one thousand packages to the Merchants' Parcel Delivery Company of Chicago, to be delivered by said delivery company to one thousand different customers of Marshall Field & Co., in the city of Chicago. Suppose that one of said customers was Richard Roe; that he had purchased from Marshall Field & Co. a certain rug, and that Marshall Field & Co. claimed that he, Roe, had received said rug through said Merchants' Parcel Delivery Company on the day on which said thousand articles were delivered by said Marshall Field & Co. to said Merchant's Parcel Delivery Company. Suppose, further, that Richard Roe denied that he had received said rug, and that Marshall Field was pressing a suit against him for the value of said rug, and the only question at issue between Marshall Field & Co., and Richard Roe in said suit was whether said rug had been delivered to Richard Roe by said delivery company. In this state of the case, for the purpose of proving that said rug was actually delivered to said Richard Roe, can it be contended that it would be admissible for Marshall Field & Co. to prove that they had delivered to the Merchants' Parcel Delivery Company the remaining 990 articles for the purpose of showing that Richard Roe had received the rug?

The foregoing illustration presents fully the question at issue, because the government sought to prove that the newspapers described in the indictment had been *delivered* to R. M. Williams at St. Louis, Missouri, and to Mr. Montgomery at Chicago, and then sought to induce the

jury to infer from the fact of said delivery that said newspapers had been deposited at the Chicago post-office for mailing.

Moreover, it was error to receive evidence tending to show that other copies of The Chicago Dispatch than those identified by the witnesses McAfee and Montgomery were received at the Chicago post-office, for the reason that the indictment charges that the publications which were deposited in the mails and contained the obscene matter were copies of the five o'clock edition of The Chicago Dispatch. And there is not a scintilla of evidence in the record tending to show that the other copies of The Chicago Dispatch objected to were copies of the five o'clock edition of said Chicago Dispatch. And certainly it will not be claimed that the fact, if it were a fact, that a thousand copies of the twelve o'clock edition of The Chicago Dispatch were received at the Chicago post-office on a given day, tended to show that two copies of the five o'clock edition of The Chicago Dispatch were received at the Chicago post-office on the same day.

The court, in the charge, reenforced the error, now under consideration, by substantially informing the jury that the question for their consideration was whether "the Dispatch was deposited in the office," meaning post-office.

IV.

There was error in receiving in evidence government exhibits numbered 2, 3, 4, 5, 6, 7 and 8.

This point embraces the 25th, 26th, 27th, 28th, 29th, 30th and 31st Assignments of Errors. (Rec., 111–114; Bill of Exceptions, Rec., 71–78.)

These exhibits are cuttings from papers, purporting to be copies of The Chicago Dispatch. It is claimed by the government that they are admissible in evidence because the papers from which they are taken were deposited in the mails at Chicago, contained obscene matters in print, and are copies of portions of The Chicago Dispatch.

It is contended on behalf of plaintiff in error that the evidence fails to show that they were deposited in the mails at Chicago, or that they are copies of portions of The Chicago Dispatch, or that they contain obscene matters in print, or, if they contain such obscene matters, that they contain matters too obscene or too long to be set out in the indictment.

First. The only testimony as to their being deposited for mailing was given by the witnesses McAfee and Montgomery. McAfee's testimony deals only with the exhibits numbered 2, 3, 4 and 5; and Montgomery's, only with those numbered 6, 7 and 8.

McAfee testifies that on June 12, 1895, he wrote a letter to the Dispatch at Chicago, Illinois, enclosed therein the sum of one dollar and twenty-five cents, and requested that the Dispatch be sent to R. M. Williams, Box 801, St. Louis, Missouri, for three months; that he signed this letter, R. M. Williams, and that thereafter he received the exhibits numbered in the record 2, 3, 4 and 5, in his private box in the post-office inspector's office in the post-office building at St. Louis, Missouri.

McAfee, on being recalled by the government the following day, testified further that he subsequently received from the Chicago Dispatch the following letter:

"CHICAGO, Sept. 15, 1895.

Mr. R. M. Williams, Box 801, St. Louis, Missouri.

DEAR SIR: Your subscription for the Dispatch expires August 13th, 1895. Kindly advise if you wish the paper continued and oblige,

Very truly yours,

JOSEPH R. DUNLOP,

E."

The foregoing is all the testimony in the record, properly received, that pertains to the depositing in the mails of the exhibits identified by McAfee.

McAfee did not request, it will be observed, that the papers be sent to him by mail, and he does not know who put the exhibits identified by him in the box where he found them, or when they were put therein, and he fails to state when he took them therefrom.

Assuredly, McAfee's testimony fails to show that he received from the mails exhibits 2, 3, 4 and 5, or that those exhibits were at any time in the channels of the mail.

On the trial the court assumed that the exhibits identified by McAfee were placed in the box wherein they were found, by an employe of the government, not a mail carrier, attached to the office of the post office inspector in the post office building in St. Louis, and then permitted McAfee to testify that it was the duty of this employe to collect the mail in the post-office proper and to distribute it in the boxes in the post-office inspector's office.

If it were conceded that the exhibits taken from the box in the inspector's office by McAfee were placed therein by such an employe as he describes, and that it was the duty of the employe to collect from the post

office all the mail intended for persons connected with the inspector's office, and to distribute it in certain boxes in the inspector's office, still the evidence would fail to establish that those exhibits were taken from the mails, because the presumption of the innocence of the plaintiff in error is stronger than the presumption that the employe did his duty. The presumption of innocence is evidence tending to prove that the exhibits were not in the mails, and this presumption was in evidence before McAfee gave his testimony. It follows, I insist, that the evidence fails to show that government exhibits 2, 3, 4 and 5 were deposited in the mails at Chicago.

And the government exhibits numbered 6, 7 and 8, what of them? Were they deposited in the post-office at Chicago for mailing? They were not, I contend. Toward the end of the trial the district attorney, acting under the direction of the court, marked with blue lead-pencil those advertisements in the different exhibits upon which he relied. In the charge the court directed the jury to consider only those advertisements marked with a blue lead pencil. The district attorney did not mark with a blue lead pencil any advertisements in exhibits numbered 6 and 7, 6 and 7 being duplicates of two exhibits identified by McAfee. The refusal or omission of the district attorney to mark with a blue lead-pencil any advertisements in exhibits 6 and 7, viewed in the light of the charge of the court, eliminated from the consideration of the jury and also from this court exhibits 6 and 7. It remains to consider whether exhibit 8 was properly admitted in evidence.

Montgomery testifies that he received exhibit 8 in the government building at Chicago in room 1, and that room 1 was his office as superintendent of mails. Ex-

hibit 8 came to Montgomery as a gratuity. All the morning and evening papers came to him in this way. He never requested that they be sent to him.

Exhibit 8 then was found by Montgomery in room 1 in the post-office building at Chicago. It was delivered there, Montgomery supposes, either by a messenger, attached to the office of the superintendent of mails or by an employe at the round table. Where exhibit 8 was obtained by the person who carried it to Montgomery's office, Montgomery does not, of his own knowledge, know. Presumably, Montgomery states, government exhibit 8 was obtained at the round table and taken thence to his office. This presumption, Montgomery testifies is based upon the custom and system that prevailed in the post-office. Montgomery's presumption or assumption that exhibit 8 was taken to his office, room 1, from the round table, is overcome by the presumption of the plaintiff in error's innocence. Otherwise, the mere presumption that an ordinary employe of the government, not a mail carrier, did his duty, is of sufficient force to overthrow the presumption of innocence and work the condemnation of a citizen on trial for his liberty.

That the presumption of the plaintiff in error's innocence is stronger than the presumption that any government employe did his duty and took newspapers from the mails and deposited them, either in the post-office inspector's office at St. Louis, or in the office of the superintendent of mails at Chicago, is elsewhere considered in this brief in arguing the error committed by the court in refusing two instructions requested by counsel for plaintiff in error. See page 570-77 of this brief.

The round table was in the room in the center of the post-office building at Chicago, five rooms distant from

room 1. The course of business at the Chicago post-office, with reference to the reception and distribution of second-class mail, was as follows:

The second-class mail was received in sacks on a platform at the Jackson street entrance to the post-office building, then weighed, and in its original packages put upon a table, called the round table. On this table, the original packages were opened and the papers taken therefrom and, with the exception of the newspapers addressed to Mr. Montgomery, distributed in divers pouches that hung about the round table. Thence these pouches were sent, by different railways and steamboats, to all parts of the world. (Rec., 57.)

The papers intended for Mr. Montgomery were, according to the custom, taken from the round table directly to room 1.

In the record there is no testimony, barring the testimony as to this custom, as to whence came the government exhibit 8, found by Montgomery in his office. Montgomery's inference from that custom is overcome, I insist, by the presumption of the plaintiff in error's innocence.

Besides, it was within the power of the government, and not of the plaintiff in error, to produce the employes of the government who delivered government exhibit 8 to room 1, and to ascertain from him directly where he obtained it. This employe was not called by the government. Hence arises the presumption that that employe, had he been called, would have given testimony unfavorable to the claim of the government, that exhibit 8 came from the round table. (Rec., 51 & 60.)

Furthermore, I contend that if Exhibit 8 was received

at the Chicago post-office, on the platform at the Jackson street entrance, taken thence to the round table, and from the round table directly, in manner and form as Montgomery supposes, to room 1, the office of the superintendent of mails, that exhibit 8 was not deposited at the Chicago post-office for mailing, within the meaning of the statute upon which the indictment is based.

Secondly. There is no evidence in the record that the papers, from which the government exhibits 2, 3, 4, 5, 6, 7 and 8 were taken, are copies of the Chicago Dispatch, described in the indictment, unless that fact is proved by the papers themselves.

The question therefore is this: If A is on trial, charged with being criminally liable for depositing in the mail the Chicago Dispatch, on the ground that he is the publisher thereof, does the mere production of a paper entitled "The Chicago Dispatch," of itself, prove that that is The Chicago Dispatch which he publishes, and which is described in the indictment?

If the government attempts to show that a defendant wrote a certain letter, will the mere fact that a given letter contains his name appended tothe letter, of itself, show that the defendant wrote that letter?

A fortiori, does not the production of a paper of the same name as the paper which the defendant is charged with publishing, of itself, prove that said paper is the one that he publishes.

The record contains no evidence tending to show that the newspapers admitted in evidence issued from the defendant's place of business.

In a trial for libel against the publisher of a newspaper, the newspaper containing the alleged libel is not ad-

mitted in evidence without proof that it issued from the defendant's place of business. The mere fact that it is in no way distinguished from the newspaper described in the declaration, is insufficient to make it admissible. Surely less evidence is not required to make a newspaper admissible under the indictment set out in this record than under an ordinary declaration for libel.

Thirdly. It is contended, that it was error to receive in evidence each of the government exhibits numbered 2, 3, 4, 5, 6, 7 and 8, because not one of them contains any matter that is obscene, lewd, lascivious or indecent.

All the advertisements in the exhibits relied upon by the government as obscene, were marked by the district attorney with blue pencil. All the advertisements, so marked, are printed in the supplement, which is attached to this brief.

Advertisements marked with blue pencil in Exhibit 2 begin on page 1 of the supplement.

Advertisements marked with blue pencil in Exhibit 3 begin on page 8 of the supplement.

Advertisements marked with blue pencil in Exhibit 4 begin on page 13 of the supplement.

Advertisements marked with blue pencil in Exhibit 5 begin on page 19 of the supplement.

Advertisements marked with blue pencil in Exhibit 8 begin on page 24 of the supplement.

To print these advertisements in this part of the brief would render it needlessly bulky. I respectfully refer this court to the advertisements printed in the supplement and, I insist, that a critical examination will satisfy the court that not one of them is matter that will excite

lascivious thoughts or sensual desires in the mind of the ordinary reader of a newspaper, and, therefore, that not one of them is obscene within the meaning of the law.

Finally, it is contended, that all and several said exhibits were not admissible in evidence, because they are not too obscene, if obscene at all, and not too long to be set out in the indictment.

The rules of pleading require the obscene matter to be set forth in the indictment *in haec verba*, unless the matter is too obscene or too long. An indictment that does not contain the matter, alleged to be obscene, or an allegation that it was not set forth because it was too obscene or too long, would be held insufficient on motion to quash. Hence the allegation that the matter is too obscene or too long to be set out in full is a substitute for an essential allegation. The substitute, therefore, becomes an essential allegation and must be proved, as laid. If, on the trial the matter alleged to be obscene is offered in evidence in support of an indictment, containing the allegation that the matter is too obscene or too long to be set forth in the indictment in full, an objection is made that said matter is not too obscene and not too long to be set forth in full, then, I contend, the matter must be held inadmissible, unless, in the judgment of the trial court, it is both too obscene and too long to be set out in the indictment. Any other rule will permit the pleader, at will, to deprive a citizen, accused of violating section 3893 of the Revised Statues, of his fundamental right to a trial under an indictment framed, in accordance with the established principles of criminal pleading.

V.

There was error in permitting the government to prove by the witness Montgomery that he received regularly all the morning and evening news papers with his name on them in the same manner in which he received the Chicago Dispatch. (Assignment of Errors 14, Rec., 102; Bill of Exceptions, Rec., 55.)

It was wholly immaterial that Montgomery received all the other newspapers as he received the Dispatch, with his name thereon, and yet this testimony was prejudicial to the interests of the plaintiff in error, because it had the effect of rendering it probable that Montgomery had received at the post-office the Chicago Dispatch in manner and form as alleged in the indictment.

This improper testimony tended to strengthen the case of the government in one of its weakest points.

VI.

There was error in receiving in evidence the following two lines, taken from the editorial columns of each one of six newspapers, entitled The Chicago Dispatch, to wit:

"THE DISPATCH

By Joseph R. Dunlop."

This point embraces the 2d, 3d, 4th, 5th, 6th and 7th Assignment of Errors. (Rec., 94, 95, 96, 97, 98, 99. Bill of Exceptions, Rec., 41, 42, 43, 44, 45, 46.)

The theory on which those two lines were received in evidence, was, that they, of themselves, tended to show

that Joseph R. Dunlop was the publisher of the paper, described in the indictment.

A letter could not be introduced in evidence against the plaintiff in error, merely because it contained the name "Joseph R. Dunlop" appended thereto. In order to render such a letter admissible in evidence, it would be necessary to show that the plaintiff in error Joseph R. Dunlop, signed his name thereto.

Throughout the trial the district judge held that a newspaper proved itself, like a document having attached thereto the seal of the United States Government. In all trials for libel against the publisher of a newspaper, based upon a publication in a newspaper, it is necessary, in order to make the newspaper offered in evidence admissible, to prove that the particular newspaper offered in evidence was the one published by the defendant. Can it be that less evidence is required against the publisher of a newspaper indicted for the violation of Section 3893?

VII.

The court erred in refusing at the close of the testimony to direct a verdict of not guilty. (Assignment of Errors 32, Rec., 115. Bill of Exceptions, Rec., 78.)

This motion should have been granted, because the evidence fails to prove :

1. That any one of the government exhibits numbered 2, 3, 4, 5, 6, 7 and 8 was deposited in the post-office at Chicago for mailing.

2. That any one of said exhibits is taken from a copy of the Chicago Dispatch described in the indictment.

3. That any one of said exhibits contains matter that is obscene.

Each of the three grounds, upon which this motion is based, has been already fully argued.

VIII.

The court erred in the following portion of his charge :

"The testimony of the government tends to show that with respect to the papers sent to Mr. McAfee, he, under the name of Williams, wrote to the Dispatch in this city (Chicago) asking them to send him the paper for a specified time and enclosing the subscription price for that period. This letter was written from St. Louis. That after that time he continued to receive the Dispatch. It was brought to his office by his messenger, supposedly from the post-office, though he himself personally does not know."

This point concerns the 39th Assignment of Errors. (Rec., 117; Bill of Exceptions, Rec., 82.)

It was error to give the foregoing instruction to the jury, because there was no legal evidence in the record tending to show that any one of the papers mentioned in said portion of the charge was brought to Mr. McAfee's office by a messenger.

The court either assumed that the papers, found by McAfee in his private box in the office of the post-office inspector at St. Louis, were deposited therein by the messenger, or inferred that they were deposited therein by the messenger, because it was the messenger's duty to place therein whatever he obtained at the post-office for McAfee. The statement was a violent assumption of a material fact by the court, or a conclusion reached by reasoning in a vicious circle.

By this instruction the court reinforced the error committed by him in assuming that any one of the papers

identified by McAfee, (government exhibits 2, 3, 4 and 5) was brought to Mr. McAfee's office, by the messenger, and in admitting evidence tending to show that it was the duty of the messenger to deposit said papers where they were found by the witness McAfee.

IX.

THE COURT ERRED IN THE FOLLOWING PORTION OF THE CHARGE.

"Now the testimony of the government also tends to show that, as a matter of fact, the Dispatch during this period was delivered at the round-table for mailing purposes; that it was delivered there in considerable quantities, and its weights taken by the weigher of the post-office department and reported to the clerk whose duty it was to record them."

This concerns the 40th assignment of error. (Rec., 117. Bill of Exceptions, Rec., 82.)

It has already been contended that the evidence upon which that portion of the charge was based was improperly admitted. If that point was well taken, it was clearly error in the court to deliver the foregoing portion of the charge to the jury. By giving said portion of the charge, the court reinforced the error committed by him in admitting the testimony, referred to therein.

In another part of the charge the court instructs the jury to consider the fact stated in the portion of the charge, last above quoted, as one of the facts tending to show the guilt of the defendant.

X.

THE COURT ERRED IN DELIVERING THE FOLLOWING PORTION OF THE CHARGE.

"So that you are at liberty to take all these facts together, consider them together, and if, upon their consideration, as a whole, you have no reasonable doubt but what the Dispatch was deposited in the office, you are at liberty to find that it was so deposited, notwithstanding the fact that no witness saw it deposited."

This is the 41st Assignment of Error (Rec., 117. Bill of Exceptions, Rec., 82.)

In the foregoing portion of the charge, the jury are directed that they may find that the Dispatch was deposited, if they have no reasonable doubt but that it was so deposited. This direction means, that they may find that it was deposited in the post-office for mailing, unless the evidence affirmatively raises a doubt as to that fact. This direction casts upon the defendant the burden of proof. He was entitled to the benefit of a reasonable doubt on that subject arising from a want of evidence. He was not required to produce evidence to create a doubt.

Besides, in the foregoing instruction, the jury are told "to take all these facts together and to consider them together." What facts? Only these legitimately in evidence? No, but those recited by the court in the portion of the charge that precedes this instruction.

And these facts, so recited, include the assumption by the court that the papers identified by McAfee were deposited in the box in the inspector's office at St. Louis by the messenger, attached to that office, the supposition by Montgomery, that the papers identified by him came from

the round table, together with the fact, improperly admitted, as to the depositing of the Dispatch, in large quantities, daily at the Chicago post-office, for mailing.

It follows, that this direction charged the jury to consider evidence not legitimately before them, together with a fact assumed by the court and a third fact, supposed by Montgomery to exist, and then to infer therefrom that the Dispatch was deposited in the post-office for mailing, unless the evidence created a reasonable doubt on that subject.

Furthermore, the jury are told in the portion of the charge, now under consideration, not, that they must find that the particular copies of the Dispatch identified by McAfee and Montgomery, namely government exhibits numbered 2, 3, 4, 5, 6, 7 and 8, were deposited for mailing, but simply that the Dispatch was so deposited.

That the Dispatch was deposited at the post-office daily, in large quantities, during the three years immediately preceding the trial, including July 6, July 27, August 10, September 14 and October 19, 1895, (the dates of the papers alleged to contain the obscene matters) was proved, against the objection of counsel for plaintiff in error, by witnesses Montgomery, Moore, Ohlander, Henry, and divers memoranda. Under that portion of the charge, now under consideration, the jury might well have believed that one element of the crime charged was established, if they found that any copies of the Dispatch were deposited at the post-office for mailing.

Nowhere does the court inform the jury to what purpose the evidence given as to the daily receipt of the Dispatch at the post-office, in large quantities, was to be applied.

XI.

The court erred in delivering the following portions of his charge:

"If, on the other hand, with all these facts in mind and giving to each its due credit in weighing the probabilities, if you can see some reasonable ground for believing or doubting that these particular papers were deposited in the post-office, you must give to the defendant the benefit of that doubt. It is your duty to come to a conclusion upon all those facts and the effect of all those facts, the same as you would conscientiously come to a conclusion upon any other set of facts that come before you in life."

"If, after having done that, you have no reasonable doubt that these papers were deposited in the post-office, it is your duty to so find that fact; if you have, then, as I said before, give to the defendant the benefit of the doubt."

This point concerns the 42d and 44th assignments of error. (Rec., 117, 118. Bill of Exceptions, Rec., 83.)

It is contended that by giving the foregoing portions of his charge to the jury the court thereby cast upon the defendant the burden of proof.

In *Abram* v. *The State*, 35 S. W. Rep., 389-390, the following instruction was given the jury on behalf of the state:

"You are further instructed, at the request of the state, that, as to the instructions of acquittal upon a reasonable doubt of defendant's guilt, such doubt must be reasonable, and based upon sound judgment. It must be fairly deducible from the evidence, considered as a whole. The mere possibility that the defendant may be innocent will not warrant an acquittal upon the ground of reasonable doubt."

Respecting this instruction, the court said:

"Again, this charge is calculated to impress the jury with the belief that the testimony itself must indicate the 'reasonable doubt' affirmatively, when the true principle is that the criminative facts must exclude it. The burden is upon the state, by proof, to exclude this 'reasonable doubt.' Such a charge as this, in substance, has been denounced by this court in a number of cases. See, *Holmes* v. *State*, 9 Tex. App., 313; *Massey* v. *State*, 1 Tex. App., 563; *Robertson* v. *State*, 10 Tex. App., 602.

"For the giving of this special charge by the court, the judgment is reversed, and the cause remanded."

In *Holmes* v. *The State*, 9 Tex. App., *313-314*, the following instruction was given the jury:

"If you have any reasonable doubt of the guilt of the defendants, such as naturally and fairly presents itself from the evidence before you, which you believe to be true, you will find that they are not guilty."

Respecting this instruction, the court said:

"The error in the other paragraph is, that it does not rest the reasonable doubt upon a lawful basis, in that it limits the reasonable doubt to the facts naturally and fairly arising from the evidence, and such evidence as the jury believe to be true. The presumption of innocence is not dispelled until the guilt of the accused is established by legal evidence, and in case of reasonable doubt as to the defendant's guilt, he is entitled to be acquitted."

In *Massey* v. *The State*, 1 Tex. App., 563, *570*, the following instruction was given the jury:

"If you have a reasonable doubt as to defendant's guilt he is entitled to an acquittal; but it must be a rea-

sonable doubt arising from and growing out of the evidence before you, and not an unreasonable doubt not growing out of the evidence."

Respecting this instruction the court said:

"A reasonable doubt, such as would entitle the defendant to an acquittal, need not necessarily arise out of the testimony; it may be the result of a want of testimony sufficient to satisfy the mind."

To the same effect is *Robertson* v *The State*, 10 Tex. App., 602.

XII.

The court erred in giving the jury the following instruction:

"It is your duty to come to a conclusion upon all those facts, and the effect of all those facts, the same as you would conscientiously come to a conclusion upon any other set of facts that come before you in life."

The foregoing sentence is the last sentence of that portion of the charge which is made the basis of the 42d Assignment of Error. (Rec., 117. Bill of Exceptions, Rec., 83.)

The court erred in giving to the jury the following instruction:

"There is no technical rule, there is no limitation in courts of justice that prevents you from applying to them" (the facts and circumstances in evidence), "just the same rules of good, common sense, subject always, of course, to a conscientious exercise of that common sense, that you would apply to any other subject that came under your consideration and that demanded your judgment."

The foregoing is the 43d Assignment of Error. (Rec., 118. Bill of Exceptions, Rec., 83.)

I request the court to consider together the two portions of the charge last above quoted. I insist that in those two portions of the charge the court affirmatively directed the jury that they had the right to depart from the well-known rules of law in considering and weighing the facts and circumstances in evidence, and to base their verdict upon the rules of good common sense, without reference to the rules of law. This was clearly error.

In *Seales* v. *State*, 25 S. E. Rep., 388, the following instruction was given to the jury:

"Your purpose is to find out what is the truth of this transaction and you use the same rules of evidence in this case—the same reasoning—that you would anywhere else on any question outside the courthouse, or inside the courthouse, only you give the defendant the benefit of any reasonable doubt in the case."

Respecting that instruction the court said:

"In the trial of a criminal case the jury ought not to use the same rules of evidence, or the same reasoning, they would use 'anywhere else on any question outside of the courthouse.' None but the Infinite can know what rules of evidence or what methods of reasoning, persons serving as jurors may invoke in transacting their business, or in dealing with other affairs, at their homes, or any other place. Criminal cases must be tried by the rules of evidence prescribed by law, and the reasoning of the jury should be in accord with these rules, under proper instructions from the bench."

In *Densmore* v. *State*, 67 Indiana, 306, the following instruction was held to be fatal error:

"Gentlemen of the Jury: Bearing in mind clearly all I have said to you, as to how you are to consider the evidence and arrive at your verdict, I may add that what is commonly called common sense is, perhaps, the juror's best guide in these particulars."

In condemning that instruction the court said:

"Now, while common sense is a very desirable and admirable quality in man, and exceedingly useful in all the practical affairs of life, including the duties of jurors, we do not see how it can be a better guide to them in the discharge of those duties than the rules of law. Indeed, the rules of law are generally the condensed common sense of ages. But the common sense of twelve jurors would not be likely to be all alike. What one might regard as the common sense view of a question, another might think utterly destitute of common sense. If each juror were to act upon his common sense instead of the rules of law, there might be as many different opinions as there were jurors. With each juror acting upon his own common sense instead of the rules of law we might expect a verdict in accordance with law 'when everlasting fate shall yield to fickled chance, and chaos judge the strife.'"

See also *People* v. *Bemmerly*, 25 Pac., 266.

Those portions of the charge wrought incalculable prejudice to the plaintiff in error. In the light of the evidence in this case every day business common sense might warrant the jury in believing, *for the purpose of transacting business*, that the papers identified by the witness McAfee, and Montgomery (and they are all the publications in evidence alleged to contain obscene matter), did come to them through the regular channels of the mail, and, therefore, in inferring that they had been deposited in the mails in the regular course of the business of The Chicago Dispatch.

In instructing the jury that they should convict the plaintiff in error, if the conscientious exercise of their common sense led them to the belief that he was guilty, the court committed a serious error.

In *Brown* v. *The State*, 16 So., 202, the following instruction was given the jury:

"You are not required to know that defendant is guilty; but if you conscientiously believe, from all the testimony, he is guilty, then you should convict him, for then you have no reasonable doubt, and the case is made out to a moral certainty."

As to that instruction the court said:

"We suppose that a conscientious belief is belief as a matter of conscience, and has reference to that which commands the assent of the moral sense of mankind. But evidence is addressed to man's reason with the primary purpose of convincing the intellectual faculty; and, in criminal jurisprudence, that evidence is required, in order to warrant a jury in pronouncing guilty one accused of crime, which, in quality and degree, in character and strength and quantity, satisfies mind and conscience. Evidence may be offered which may be conscientiously—that is, faithfully—believed, and yet fall far short of convincing the mind of the truth of the proposition which it is offered to support and demonstrate. We fear that the instruction which defined conscientious belief to be such as left no room for reasonable doubt, and rose to the height of moral certainty, was erroneous. In the matter of giving instructions, the beaten way is the safe way; the known paths are the sure ones. *Reversed.*"

In *Burt* v. *The State*, 10 So., Rep. 342 (also 72 Miss., 408), the court say:

"It is assigned for error that the court erred in granting the second instruction asked by the state. We have held at this term, in Brown's case, 16 So., 202, that this instruction is erroneous. The facts of the case—a case in which the evidence consists of vague threats and circumstantial evidence—emphasize with peculiar force the correctness of that ruling. This certainly is a case in which we cannot say such charge was not material, reversible error. The many unwise efforts to define a 'reasonable doubt' are very remarkable, in view of the previous decisions of this court and other courts, and of the fact that the phrase itself, 'beyond a reasonable doubt,' is an expression invented by the commonlaw

judges for the very reason that it was capable of being understood and applied by 'plain men in the jury box'."
2 Thomp. Trials, Sec. 2463.

"If the common-law judges, in their wisdom, settled on this expression, 'beyond a reasonable doubt,' as the one most easily understood by 'plain men in the jury box,' can we not accept this refined gold without seeking to gild it,—this 'lily' without 'painting'?

"Campbell, J., in *Hamilton* v. *People*, 29 Mich., 194, says: 'If a jury cannot understand their duty when told they must not convict when they have a reasonable doubt of the prisoner's guilt, they can very seldom get any help from such subtleties as require a trained mind to distinguish. Jurors are presumed to have common sense, and to understand common English, but they are not presumed to have professional, or any high degree of technical or linguistical training.' Mr. Thompson says (2 Thomp. Trials, p. 1817, Sec. 2463), that most American courts have, however, felt called upon, in instructing juries in criminal cases, to explain this expression, although it is one of the most exact expressions known to the law, and to define this definition although the words convey a more exact idea to the minds of average men than can be derived from any attempt to define them. In so doing they have attempted to lead juries into mazes of subtlety and casuistry in which they were lost themselves, and into which the minds of the 'plain men' were incapable of following them.' Mr. Stephens tells us that 'the effort to define a reasonable doubt is an effort to compute that which is not number, and to measure that which is not space.' It ought, it seems to us, to be sufficient in all cases to say: "If the jury, from the evidence, believes beyond a reasonable doubt that,' etc. If this course were observed, would there be a conviction less? Would there not he many reversals saved? We do not say a case may not occur in which it would be well to go beyond this, but we doubt if it would not be best to adhere to it in far the larger number of cases; and the representatives of the state—an able and accomplished body of gentlemen—should heed the voice of wisdom and caution, saying to them, as to this brief and plain formula: 'This is

the way. Walk ye in it.' There may be cases in which instructions in somewhat similar language, in this court, have not secured reversal, because no error was predicated of them, or they were cured by other instructions. The charge in Taylor's case, 52 Miss., 88, while in one sentence containing the phrase 'conscientiously believe' in other parts of the same charge expressly declared that 'the guilt of the accused must be fully and conclusively established to a moral certainty, and to the exclusion of every reasonable doubt.' There is nothing here to cure the error. 'Conscientiously,' in a charge of this subject, is inapt, is erroneous. One may 'conscientiously'—that is, sincerely, honestly-believe, having reference to the gravity of his belief, a thing to be true which he does not, having reference to the strength or degree of his belief, believe 'beyond a reasonable doubt.' In many cases the expression 'the evidence must satisfy your minds and conscience beyond a reasonable doubt' is used, and that form is correct enough because, of the latter qualification. 'Satisfy' alone will not do it. Hawthorne's case, 58 Miss., 789. 'Conscientiously' is a word of quality, rather than of quantity; and the rules of evidence differentiating criminal procedure from civil in this regard is a rule of quantity, — a rule, not as to the sincerity of a belief, however weak, though real, but as to the strength of his belief."

XIII.

The court erred in delivering the following portions of his charge to the jury:

"Now, what is obscene, lascivious, lewd or indecent publications is largely a question of your own conscience and your own opinion, but it must come, before it can be said to be such literature or publication, it must come up to this point, that it must be calculated with the ordinary reader—to deprave him, deprave his morals or lead to impure purposes."

"Now reading these paragraphs (the advertisements in evidence) that counsel have called to your attention, and you will take them with you to your jury room, it is your

duty to ascertain in the first place if they are calculated to deprave the morals, if they are calculated to lower that standard which we regard as essential to civilization; if they are calculated to excite those feelings which in their proper field are all right, but which transcending the limits of that proper field play most of the mischief in the world. If they are, then they are obscene, lewd and lascivious within the meaning of the statute. If not, then they are not so within the meaning of the statute."

This point concerns the 48th and 49th Assignment of Errors, (Rec., 119; Bill of Exceptions, Rec., 84, 85).

Those portions of the court's charge contain the only definition, given to the jury, of the test of what constitutes obscene literature. The test, as given by the court, is too broad. The court instructed the jury, that that is obscene literature which tends to deprave the morals of the public *in any way whatever*, whereas the true test of what constitutes obscene literature is that which tends to deprave the morals in one way only, namely, by exciting sensual desires and lascivious thoughts.

U. S. v. *Clark*, 38 Fed., 732.
U. S. v. *Bennett*, 16 Blatchford, 338.

Under the court's definition of obscene literature, the jury were justified in finding that the published matter offered in evidence was obscene, if in the judgment of the jury it was likely to lead the ordinary reader to steal or to practice any vice whatever, or was likely in some way to lower the standard of civilization.

Such an instruction was very mischievous in the case at bar.

If the test of what constitutes an obscene, lascivious, lewd or indecent publication, as defined by the court in the charge be combined with what the court said to the

jury to the effect that there was no limitation in courts of justice that prevented them from applying to the facts and circumstances in evidence the same rules of good common sense, subject to a conscientious exercise of that common sense (42d and 43d Assignments of Errors; Rec., 117, 118), it will clearly appear that the court charged the jury substantially as follows:

Gentlemen of the jury: What is an obscene publication is largely a question of your conscience and your own opinion. If you personally and conscientiously are of opinion that the advertisements in evidence were likely in any way whatever to result in depraving the morals of the ordinary reader, or in inducing him to depart from the path of a pure life, or that the reading of such advertisements by the community generally might lower the standard which you regard as essential to our civilization, then the advertisements are obscene within the meaning of the statute. And in considering the evidence with reference to the question whether the advertisements are obscene according to the test which I have just laid down, remember that the rules of law are no limitation whatever upon your judgment. If, disregarding the rules of law, you at your firesides or in your counting rooms would come to the conclusion by the conscientious exercise of good common sense and the methods of reasoning usually adopted by good citizens at their firesides or in their counting rooms, that the advertisements are obscene, then I charge you that you are justified as jurors in finding that they are obscene within the meaning of the statute.

XIV.

The court erred in the following portion of the charge:

"The paper itself introduced in evidence contains on one of its pages the statement that it is published by Joseph R. Dunlop, and in response to an inquiry by the court of one of the witnesses it was stated that it was not known that there was any other Joseph R. Dunlop in the newspaper business in the city of Chicago."

This concerns the forty-sixth Assignment of Error (Rec., 118; Bill of Exceptions, Rec., 89).

This portion of the charge was based upon evidence improperly admitted for the purpose of showing that the defendant was the publisher of The Chicago Dispatch.

By that portion of the charge the court reinforced the error committed by him in admitting the improper evidence. The fact that the paper contained the line "By Joseph R. Dunlop" at the head of the editorial columns, does not make that line admissible to prove that Joseph R. Dunlop is the publisher thereof. The name, Joseph R. Dunlop, appended to a letter, would not of itself, make the letter admissible in evidence as one written by the plaintiff in error.

XV.

The court erred in refusing to give the jury the following instructions requested by the defendant:

"The court instructs the jury that the presumption of innocence in this case is stronger than the presumption that the government employee who delivered the newspapers to Mr. Montgomery in the Chicago post-office building obtained said newspapers from the United States mails."

"The court instructs the jury that the presumption of innocence in this case is stronger than the presumption that the person who deposited the copies of The Chicago Dispatch in the box in the St. Louis post-office building, from which box the witness McAfee took said papers, obtained said newspapers from the United States mails."

This concerns the 50th and 51st Assignments of Errors. (Rec., 119, 120, Bill of Exceptions, Rec., 90.)

These refused instructions contain a rule of law applicable to the case, as it was given to the jury. There was no evidence in the record tending to show that the papers identified by McAfee were taken from the United States mails at the St. Louis post-office, except the presumption that the clerk of the post-office inspector's office at St. Louis did his duty, and took said papers from the post-office and placed them in the box in the inspector's office, where they were found by the witness McAfee. The presumption of innocence in the case at bar was stronger than the presumption that the clerk or messenger attached to the post-office inspector's office in St. Louis did his duty. Besides, the presumption that the clerk attached to the post-office inspector's office in St. Louis did his duty, was based upon evidence improperly admitted by the court.

For a similar reason the court should have charged that the presumption of innocence in this case was stronger than the presumption that the person who placed in Montgomery's office such papers as were identified by him, obtained said papers from the United States mails.

It has been uniformly held that the presumption of the defendant's innocence in a criminal case is stronger than any presumption, except the presumption of the defendant's sanity, and the presumption of knowledge of the law.

The court will remember that these instructions concern the evidence upon which the government relied for the purpose of showing that the newspapers introduced in evidence were deposited in the mails.

In the case at bar in the last analysis, there is no evidence that the published matter was mailed, except the sheer presumption, that ordinary employes of the government, not mail carriers, did their duty and performed certain acts.

If ever there was a case where the court should give the two refused instructions last above quoted, the case at bar was that case.

The force of the presumption of innocence as compared with the force of some other presumption with which it came into conflict is illustrated by the following authorities and decisions:

In *Jayne* v. *Brice*, 5 Taunt., 326, it is held that nothing can be clearer than this—"a presumption may be rebutted by a contrary and stronger presumption."

In Lawson on Presumptive Evidence, page 447, will be found the following rule:

"Rule 92. Where there are conflicting presumptions the presumption of innocence will prevail against the presumption of the continuance of life, the presumption of the continuance of things generally, the presumption of marriage and the presumption of chastity. But it is otherwise as to the presumption of knowledge of the law and the presumption of sanity.

In Best on Evidence, Morgan's Notes, Vol. 2, page 602, the following statement is found in foot-note 1:

"It is settled in the United States, for instance, that the presumption of innocence will override all other presumptions, even the presumption of chastity in a female."

West v. *State*, 1 Wis., 209.

In *West* v. *The State*, 1 Wis., 209, an indictment for the seduction of an unmarried female, the trial court gave the jury on behalf of the prosecution the following instruction:

"The law presumes that the prosecutrix, Eliza Pierce, was a chaste female previous to the commission of the offense alleged against the defendant."

As to the instruction given by the trial court to the effect that the law presumed that the prosecutrix Eliza Pierce was a chaste female previous to the commission of the offense alleged against the defendant the Supreme Court of Wisconsin say, *supra*, 215:

"It is true, that ordinarily, the reasonable and just presumption is in favor of female chastity. So is, likewise, the presumption in favor of moral honesty. Happily, these presumptions are not only justified in all civilized nations, but nobly illustrated, as well by the institutions of social life, as by the laws enacted by government. Social intercourse is based upon the presumption of virtue, and society is obliged, so far to conform to this law of its existence, that even in its most corrupt state, it is compelled to put on, at least the form and semblance of virtue, though its spirit may have departed."

"In every issue in which the integrity of an individual is attacked, the presumption of the law comes to his aid. Every person charged with crime, is presumed innocent, till he be proved guilty. Fraud is never to be presumed, but must always be proved. Every female charged with an offense, the essence of which is unchastity, is presumed to be chaste, until the contrary appears."

"But these excellent and humane presumptions of the law, so pregnant with the testimony which it bears, to the dignity and honor of human nature, are always to be used, in the administration of justice, as a weapon of defense, not of assault. They are the shield of the accused, not the sword of the prosecutor."

"The previous chaste charater of the female is one of the most essential elements of the offense; made so by the express words of the statute, in conformity with the suggestions of sound reason. A prostitute may be the subject of rape, but not of seduction. It is the chastity of the female, which the statute is designed to protect. The pre-existence of that chastity is a *sine qua non* to the commission of the crime. That is the subject of legal guardianship, provided by this section. It is a substantive matter necessary to be averred and proved."

"If the prosecutrix were to change places, and were she indicted for lascivious conduct, then, indeed, the legal presumption would come to her aid, and her chastity would be presumed. But when the state accuses one of its citizens with the violation of the chastity of another of its citizens by seduction, the law presumes the accused to be innocent of the entire offense, until the contrary appears. The state cannot be permitted to presume the immediate pre-existence of that chastity, with the destruction of which the defendant is charged. One act of illicit intercourse affords no presumption that another has not preceded it.

"It is not the act of illicit intercourse merely, which is contemplated by the 6th section; but it is the prostration, by means of seductive arts and appliances, of the virtue of the female, by which her chastity has been violated, and her moral, as well as her physical condition changed and polluted. The gravamen of the state's com-

plaint is, that a pure and chaste female, has been rendered impure and unchaste, by the seduction and illicit connection of the defendant. The presumption of innocence which the law affords the defendant, must be as broad as the offense charged, and it would seem, that the scope and strength of that presumption should not be lessened or impaired by counter presumption.

"The previous chaste character of the female is by no means difficult of proof. If her character were unchaste, it could easily be shown; if otherwise, the very fact that it had never been questioned, would, perhaps establish it. In this case the prosecutrix testified, that she had never had connection with any one but the defendant. Slight corroboration might have been sufficient. But the error consists in the instruction which the court gave the jury, to the effect, that the law presumed that she was previously of a chaste character, *independent of any proof whatever*. This is setting up a presumption on the part of the state, the prosecuting party, incompatible with the presumption which the law affords the defendant; and if the principle should prevail, the presumption of the virtue of one citizen, might work the condemnation of another, in whose favor the law affords equal, and when charged with crime, even stronger presumption."

To the same effect are

People v. *Roderigas*, 49 Cal., 9.
Zabriskie v. *State*, 43 N. J. L., 640.
Oliver v. *Com.*, 47 Am. Rep., 704.
Com. v. *Lily Whittaker*, 131 Mass., 224.

"In some cases, the presumption of innocence has been deemed sufficiently strong to overthrow the presumption of life."

1 Greenlf. on Ev. Sec. 35.
Quinn v. *The State*, 46 Ind., 459.

In *Sharp* v. *Johnson*, 22 Ark., 79, 90, the court say: "In this case, the opposing counsel were each insist-

ing on the benefit of a presumption in their favor; the plaintiff's counsel, on the presumption of John B. Powell's innocence of the crime of bigamy; while the defendant's counsel wished an application of the presumption of life alone, and the question was, which is the stronger presumption?

The court answered the question in favor of innocence, and it did right."

To the same effect are

Greensboro v. *Underhill*, 12 Ver., 604.
Chapman v. *Cooper*, 32 S. Car. L., 452–460.
Lockhart v. *White*, 18 Tex., 102–110.
Yates v. *Houston*, 3 Tex., 433–442.
Hull v. *State*, 7 Tex. App., 593.
People v. *Feilen*, 58 Cal., 218–224.
Breiden v. *Paff*, 12 S. & R. (Pa.), 430.
Kelley v. *Drew*, 12 Allen (Mass.), 107.

In *Montgomery* v. *Bevans*, 1 Sawy., 653–666 the court says:

"And the presumption of life is received in the absence of any countervailing testimony as conclusive of the fact, establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails."

To the same effect also is,

19 Am. & Eng. Enc. of L., 40.

"The presumption of innocence will prevail over the presumption of the continuance of an existing state of things."

Rule 38, Lawson on Pres. Evidence, p. 191.

"A and B as husband and wife, sued C in an action of slander for words spoken. They proved their marriage. Declarations made by the wife of B, to the effect that previous to her marriage to A she had been married in Germany to another man, were admitted in evidence in favor of C, to show the marriage with A invalid."

"Held, that the law, under such circumstances, would presume in favor of the innocence of B in contracting the second marriage; that the first marriage had been dissolved by death or a decree of divorce."

Cline and wife v. *Laudman and wife*, 29 Mo., 259.

A was indicted for illegally selling liquor. It was proved that it was sold in his absence by his clerk. The fact that the clerk had previously made similar sales, which A had approved, does not raise the presumption that the last sale was with his consent. On the contrary, as everybody is to be presumed innocent until his guilt is made manifest, we should presume that he repented his former transgressions and therefore did not consent to the subsequent violation.

Patterson v. *State*, 21 Ala., 571.

Where the presumption of innocence comes in conflict with the presumption that a public officer did his duty, the presumption of innocence will prevail.

Supervisor of Houghton County v. *Rees*, 34 Mich., 481.

Weimer v. *Bunbury*, 30 Mich., 203.

19 Am. & Eng. Ency. of Law, 40.

The case of the *Supervisors of Houghton County* v. *Rees*, *supra*, was an action to charge the defendant Rees, who was the county treasurer of Houghton county, on his official bond, with failure of duty in not forwarding to

the Auditor General lists of delinquent tax lands. The theory of the plaintiff was, that it was Rees' official duty on receiving, in due form and season, lists of delinquent tax lands from the different township treasurers of his county, to forward transcripts thereof in due form and lawful season to the Auditor General; that the township treasurer did in fact seasonably and in proper form report to him, Rees, such lists, but that he neglected to forward transcripts thereof to the Auditor General, and thereby became liable to the penalties provided by law for such omission of duty.

The evidence disclosed that Rees received from the township treasurer the proper lists of delinquent tax lands and that transcripts thereof were not forwarded by him to the Auditor General. The evidence was silent as to when Rees received these lists from the township treasurer. By statute law it was the duty of the township treasurer to make these returns to the county treasurer by a certain time, and unless they were made by that time, the county treasurer was under no obligation to forward the transcripts, for a lack of which the suit was brought. Passing upon this lack of evidence the court say, on page 488:

"But it may be said that this omission of express evidence may be supplied by presumption and that it should be intended that the township treasurers performed their duty and consequently made their returns on time to enable the county treasurer to make and forward transcripts in season. * * * We think the case cannot receive aid through the presumption in question. There is as much reason for saying that Rees must be presumed to have performed his duty and to have forwarded transcripts as soon as he had the necessary transcripts from below as there is for saying the township treasurers must be presumed to have performed theirs

and to have made their return to him seasonably. The law made their action a necessary preliminary to his, and it will not allow due performance on their part to be proved by naked presumption in order to charge him with having failed to perform duty."

Or in other words, the law would not allow the presumption of the performance of official duty to overcome the presumption of innocence, and this in a civil case, where as evidence less weight is given to the presumption of innocence than in a criminal case.

To the same effect is *Weimer* v. *Bunbury*, *supra*, and both of these cases are cited in support of the foregoing proposition of law in

19 Am. & Eng. Enc. of Law, page 40.

XVI.

The court erred in refusing to give the jury the following instructions:

"The court instructs the jury that the office of the witness, Mr. Montgomery, in the post-office building in the city of Chicago is not a part of the post-office within the meaning of the law upon which this indictment is based."

"The court instructs the jury that the place where the witness McAfee found certain newspapers in the city of St. Louis, Missouri, namely, the post-office inspector's office, is not a part of the post-office at St. Louis within the meaning of the law upon which this indictment is based."

This point concerns the 52d and 53d Assignments of Error (Rec., 120). (Bill of Exceptions, Rec., 90.)

The questions raised by these instructions were, whether the office of the superintendent of mails in Chicago was a part of the Chicago post-office, and whether the post-

office inspector's office in St. Louis, was a part of the post-office at St. Louis.

The refusal of these two instructions left the jury at liberty to conclude that those two offices were portions of the United States post-offices, within the meaning of the statute, and then to infer from said conclusion that the newspapers admitted in evidence were deposited in the mails, because they were found in said offices.

In considering this point the court will remember that the papers introduced in evidence as the papers that were deposited in the mails and contained obscene matter, were found only in the offices mentioned in those refused instructions.

Whether papers found in the inspector's office in the St. Louis post-office building, was in the mail or not, was a nice question of law, the court ruled during the trial, which he reserved for a later period of the trial. (Rec., 51, 52.) By the refusal of these two instructions the court held, in substance, that a paper found in the office of the superintendent of mails, in the post-office building at Chicago or in the inspector's office in the post-office building at St. Louis, was a paper deposited in the mails.

XVII.

The court erred in refusing to give the jury the following instruction:

"The court instructs the jury that there is no evidence in this case tending to show that the newspapers containing the address of R. M. Williams came from or were taken from the post-office at St. Louis, Missouri." (Bill of Exceptions, Rec., 91. Assignment of Errors, 54; Rec., 120.)

Had this instruction been given, its effect would have been to exclude from the consideration of the jury the four papers identified by the witness McAfee. They should have been excluded, because the evidence did not warrant their admission.

XVIII.

The court erred in refusing to give the jury the following instruction:

"The court instructs the jury that, if they believe from all the evidence in this case that it was in the power of the government to produce as witnesses in this case the persons who, it is claimed by the government, took the newspapers addressed to R. M. Williams from the post-office at St. Louis, or the newspapers addressed to Mr. Montgomery from the round table in the post-office in Chicago, then the jury are at liberty to draw the inference that the government did not produce said persons as witnesses because the government officers conducting the prosecution believed or feared that the testimony of such witnesses, if produced, would not tend to support the theory of the prosecution in this case." (55th Assignment of Errors, Rec., 120. Bill of Exceptions, Rec., 91.)

The government did not call as witnesses the persons mentioned in the foregoing refused instruction. It was clearly the duty of the government to call these persons as witnesses. Their testimony was the best evidence. Remember that the only evidence in the case tending to show the guilt of the defendant is circumstantial. In a criminal case, where a given ingredient of the crime is sought to be established exclusively by circumstantial evidence and it is within the power of the government to produce a witness who can state certainly whether or not the act was done or the fact occurred, which constitutes said ingredient of the crime, and the government fails to call such witness, or to account for his absence, the presumption is that, if such witness had been called, his testimony would be unfavorable to the theory of the prosecution. The government knew who these witnesses were. The defense did not. (Rec., 51, 60.)

Gordon v. *People*, 33 N. Y., 501, *508*.

This presumption has been invoked even against the defendant in a trial for murder.

Hovey v. *The People*, 95 N. Y., 554.

XLX.

The court erred in refusing to give the jury the following instructions:

"That in dealing with circumstantial evidence, an inference from an inference is strictly forbidden, and that, therefore, the jury are not at liberty in this case to assume that the clerk n the post-office inspector's office at St. Louis, Missouri, did his duty, and then to infer from the assumed fact that said clerk did his duty, that said chief clerk took the newspapers addressed to R. M. Williams from the post-office at St. Louis, Missouri."

"And the jury are further instructed that they are not at liberty in this case to assume that the person or persons whose custom it was to bring the Chicago Dispatch to Mr. Montgomery followed that custom, or did his or their duty, and took the newspapers addressed to Mr. Montgomery from the so called round table in the post-office at Chicago, Illinois, and then infer from the assumed fact that such person or persons so followed the usual custom or did their duty, that said newspapers were actually deposited in the post-office at Chicago, Illinois, for mailing."

This point concerns Assignment of Errors 56 and 57, (Rec., 121); (Bill of Exceptions, Rec., 91, 92).

The foregoing instructions were based upon the state of the case as it was given the jury.

The rule is stated in the instructions refused.

U. S. Appts. v. *Ross*, 2 Otto, 281, 285.
Douglass v. *Mitchell*, 35 Pa. St., 440.
Phila. City Pass. R. Co. v. *Henrice*, 92 Pa. St., 431.
Grand Trunk R. Co. v. *Richardson*, 41 U. S., 970.

XX.

The court erred in refusing to give the jury the following instructions:

"The court instructs the jury that any circumstance which is essential to a conclusion of guilt against the defendant, should be established beyond all reasonable doubt before it can be used by the jury against the defendant."

"The court instructs the jury that in order to justify the inference of guilt from circumstantial evidence, the existence of the inculpatory facts must be inconsistent with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. If you can reconcile the facts in this case on any reasonable theory consistent with the innocence of the defendant, it is your duty to do so, and to find the defendant not guilty." (This is the 58th and 59th Assignment of Error, Rec., 121; Bill of Exceptions, Rec., 92.)

The foregoing instructions contain rules of law applicable to a criminal case where the evidence is exclusively circumstantial. Such was the case at bar. In no portion of the charge were the principles given that are stated in the foregoing instructions.

As to the rule see:

Burrill on Circ. Ev., pages 728, 732, 737.

XXI.

Error highly prejudicial to plaintiff in error was committed by the following remarks of the United States Attorney in his argument to the jury, made after the evidence was closed:

"I do not believe that there are twelve men that could be gathered by the *venire* of this court within the confines of the State of Illinois, *except where they were bought and perjured in advance*, whose verdict I would not be willing to take upon the question of the indecency, the lewdness, lasciviousness, licentiousness and wrong of these publications." (Assignment of Errors, 36, Rec., 116; Bill of Exceptions, Rec., 19.)

This error was not cured by the court's ruling thereon. The court gently withdrew the lance, but the incurable wound remained.

What an effective remark for a juror voting guilty to a juror voting not guilty is contained in the foregoing language of the United States' attorney!

Error highly prejudicial to plaintiff in error was also committed in the following language of the United States Attorney, addressed to the jury in the argument made by him after the evidence was closed:

"Now, gentlemen, it is not necessary for me to tell you what the massage treatment is—how a man is stripped naked from the sole of his feet to the top of his head, and rubbed with the hands." (Assignment of Errors 37 and 38, Rec., 116; Bill of Exceptions, Rec., 79.)

This language was sanctioned by the court when the counsel for plaintiff in error excepted thereto.

In order to perceive the baneful effect of the foregoing language, read the advertisements under the heading

"Baths," contained in Exhibits 2, 3, 4, 5 and 8. These advertisements are substantially alike in all the exhibits. Read any one in Exhibit 2, page 7, of the supplement to this brief.

The effect of the definition of massage as given by the district attorney and the court was to inform the jury that those advertisements were the publication of offers on the part of certain women to strip men naked and then to rub them from head to foot.

The picture thus presented to the jury was revolting, and yet there is nothing in the language of the advertisements *per se* that is obscene.

Was not this interpretation of the massage advertisement, thus sanctioned by the court, of itself, sufficient to work a conviction?

I contend that, under the rulings of this court, published matter is not obscene, unless the obscenity appears in the language itself. This principle applied to the case at bar at the different points raised by exceptions taken on the trial is sufficient to work a reversal of the judgment.

XXII.

The court erred in overruling a motion, made on behalf of the plaintiff in error before the trial, to require the district attorney to file the printed matters, or copies thereof, which the government charged in the indictment were obscene. This motion was made, as the court was informed, for the purpose of enabling the plaintiff in error to demur to the indictment, on the ground that the matters charged therein to be obscene could not in law be held to be obscene, even if the jury were so to find.

This point embraces the 1st Assignment of Error. (Rec., 93, Bill of Exceptions, Rec., 38.)

The effect of overruling this motion was to deprive the defendant of the right to demur to the indictment, on the ground that the matter charged therein to be obscene was not obscene within the meaning of the law. The right to demur to an indictment is one of the fundamental rights of trial guaranteed to every defendant in that provision of the constitution which provides that no person shall be deprived of life, limb or liberty without due process of law. No defendant in a criminal case can be deprived of the right to demur prior to the trial by a mere form of pleading. By requiring the district attorney to file copies of the obscene publications, the government would not have been prejudiced in any way. Until the obscene matters were filed, the plaintiff in error could not demur. Because the printed matters, alleged to be obscene, were not on file, the question as to whether they were obscene could not be presented in the motion in arrest of judgment.

WILLIAM S. FORREST,
Attorney for Plaintiff in Error.

INDEX TO SUPPLEMENT.

GOVERNMENT EXHIBIT 2,
Personal ..... page 1
Baths ..... page 7

GOVERNMENT EXHIBIT 3,
Personal ..... page 8

GOVERNMENT EXHIBIT 4,
Personal ..... page 13
Baths ..... page 18

GOVERNMENT EXHIBIT 5,
Personal ..... page 19

GOVERNMENT EXHIBIT 8,
Personal ..... page 24
Baths ..... page 28

SUPPLEMENT.

Government Exhibit 2.

ADVERTISEMENTS MARKED WITH BLUE PENCIL IN GOVERNMENT EXHIBIT 2 ARE THE FOLLOWING:

PERSONAL.

PERSONAL—Elderly gentlemen with young wives, "middle-aged men" who feel a weakness beyond their years, and young men who have committed excesses and errors, find in "Vigorola" and "Santao" the only always reliable, always effective remedies, which never fail to benefit promptly and effect a permanent cure when the full treatment is taken.

"Vigorola" improves the memory, brightens the intellect, steadies the nerves, and restores lost sexual strength. It restores the full enjoyment of sexual vigor and rejuvenates all youthful powers. Its efficacy is a delightful surprise to the afflicted and the demand is increasing with astonishing rapidity.

"Santao" increases the circulation in and strengthens the parts, develops undeveloped or shrunken parts, cures varicocele, lessens night emissions and cures premature discharges by contracting, soothing and strengthening the distended and irritated seminal vesicles, thus securing the normal condition in ejaculation, and lessening the danger of loss of semen by emission or oozing away.

The "combination treatment" consists of "Vigorola" taken internally and "Santao" applied externally. It is

a combination which is capable of rectifying and curing all disorders of the sexual system and is positively unequalled by any treatment or system in its effects. It is the only rational, common sense method and it appeals to the reason. It is pleasant, speedy and, best of all, always effectual.

Pamphlets free to any address; advice free; business confidential.

Price of either remedy, $2.00 per bottle, or three bottles for $5.00. Price of full combination treatment, $10.00.

DR. H. T. MILLER,
21 Quincy-st., Chicago.

PERSONAL—Mrs. Clara Fagario, 353 W. Madison-st.; Miss Hazel and Miss Florence have returned from the country and will be pleased to see old friends at 353 W. Madison-st.; will also give lessons in elocution.

PERSONAL—men only—I will gladly send to any man, young or old, the receipt, with full directions, in plain sealed envelope, that cured me of lost manhood, impotency, varicocele, sexual weakness, etc., and greatly enlarged my small, shrunken sexual organs, which was the result of self-abuse and sexual excesses. Address, with stamp, in confidence. C. J. Walker, Box 937, Kalamazoo, Mich.

PERSONAL—A young country girl from the rural districts, recently from school, wishes to meet a refined gentleman during her stay in the city. 54 S. May-st., Room 12, second flat.

PERSONAL—A young widow, affectionate nature, with no one but herself, wishes to meet a gentleman who

would appreciate those qualities. 54 S. May-st., Room 15, second flat.

PERSONAL—"Regulator Tablets" are safe, reliable and always effective; tansy or pennyroyal are not to be compared with these scientifically compounded tablets, which never fail and never disappoint; they are incomparable, and used by thousands of ladies with the highest degree of satisfaction; the demand is rapidly increasing, as ladies tell each other they have at last found a "regulator that regulates;" price, extra strong, $2 per vial; mailed sealed. Mrs. Dr. H. T. MILLER, 21 Quincy- st., Chicago.

PERSONAL—Miss Volkman, a German lady, with her sister, who is only a few days from Germany, would like to meet refined gentlemen. 518 Wabash-av., over grocery store.

PERSONAL—Wanted—A maiden lady who is capable of appreciating a gentleman of culture and loving nature; no money consideration. Address Q 179. The Dispatch.

PERSONAL—Miss Rawska, a Polish lady, will be pleased to meet refined gentlemen; also pleasant rooms to rent to transient parties. 1227 Wabash-av., flat No. 1.

PERSONAL—Should middle-aged or elderly gentleman desire to meet young lady, recently graduated, at house of lady friend, please address Q 153, The Dispatch.

PERSONAL—A litle Jewish lady, not quite 19, stranger in the city, wishes to meet a gentleman who would appreciate refinement. 414 W. Madison-st., first flat right.

PERSONAL—A young Jewish lady, stranger, wishes the acquaintance of a select gentleman who would appreciate refinement. 554 W. Madison-st., first flat front.

PERSONAL—138 E. 22d-st., upstairs, between Wabash and Michigan-avs.—Young German lady, entirely alone, wishes the acquaintance of a gentleman.

MISS BLANK.

PERSONAL—Should choice exclusive apartments be desired "occasionally," widow's private home affords every facility; convenient. Address R 165, The Dispatch.

PERSONAL—A young blonde German lady, in her own home, would like to make the acquaintance of a refined gentleman. 170 E. Indiana-st., near LaSalle-av.

PERSONAL.—A quiet young Irish girl, not used to city life, would like to meet a business gentleman; object pleasant time. 54 S. May street, room 14.

PERSONAL.—1518 Wabash ave., First floor, Suite 1.—Dolly, a little English girl, (18), would like to make the acquaintance of a refined gentleman.

PERSONAL.—A young widow living entirely alone would rent rooms to refined gentlemen, with home comforts, 2350 State street, first flat.

PERSONAL—Irene Darlington, late of SanFrancisco, desires to meet a gentleman during her visit. 629 West Madison-st., first flat.

PERSONAL—A tall, handsome lady, brunette, wishes to meet a refined gentleman of means. 2008 State-st., first flat, right.

PERSONAL—270 E. Illinois-st.: A refined German widow, entirely alone, wishes to form the acquaintance of a gentleman.

PERSONAL—Two ladies living at 244 W. Madison-st. would like to meet a few refined gentlemen; first flat.

PERSONAL—May Birch and Nettie St. John are now with Birdie Lee, 328 W. Madison st., upstairs.

PERSONAL—An attractive widow living in aristocratic neighborhood in elegant apartment building having lovely flat, will rent rooms to discreet transient parties; everything first-class and confidential; no general delivery. Address Y 176, The Dispatch.

PERSONAL—An agreeable young widow living in private apartments on Wabash ave., between 31st and 35th st., will entertain a business gentleman. Inclose stamp. Address Z 150. The Dispatch.

PERSONAL—A lady living quietly near Michigan ave. and 20th st, would introduce ladies employed to refined gentleman; also neat rooms for transient couples. Address W 137, The Dispatch.

PERSONAL—A little brunette, just from school and of an inquisitive nature, wishes the acquaintance of a business gentleman. 1518 Wabash av., first floor, suite 3.

PERSONAL—Gentleman wants the acquaintance of stout and affectionate little lady living alone; object, pleasure. Address, B. W., Box 364, Highland Park, Ill.

PERSONAL—The French twins, Mabel and Toots De Ferras, lately of Paris, give French and Spanish treatments. 2010 State st., top flat, left.

PERSONAL—Young Jewish lady, just from the south, would be pleased to meet a business gentleman. 477 W. Madison st., top floor, right.

PERSONAL—1518 Wabash av., first floor, suite 1—Trixy, a little Jewish girl, 18, stranger, would like the acquaintance of a refined gentleman.

PERSONAL—A young lady, blonde, stranger in the city, living alone, wishes the acquaintance of a gentleman. 2007 State-st., first flat right.

PERSONAL—392 W. Madison-st.—Young widow, stranger in the city, accompanied by her sister, wishes to meet two refined gentlemen.

PERSONAL—Young lady, 19, would gladly reciprocate the friendship of a middle-aged gentleman. Address X 130, The Dispatch.

PERSONAL—A first-class transient house wants lady boarder; good chance to make money. 19 E. Harrison-st.

PERSONAL—307 Wabash-av., first flat left; the Spanish lady of 285 W. Madison-st. is located at above number.

PERSONAL—The little lady from the south has removed to 175 E. Jackson-st., Room 1. Buano Hair Tonic.

BATHS.

2010 STATE-ST., 2010
TOP FLOOR, LEFT.

Miss Mabel gives the Corean and mamary treatments; indiosyncrasies a specialty.

GERTIE LIVINGSTON TREATS INDIOSYNCRASIES; Turkish and Spanish given. 629 W. Madison-st., first flat; hours 12 to 12.

512 W. MADISON-ST., TOP FLAT, FRONT—Miss Maud from Kentucky, assisted by Miss Blanche.

1518 WABASH-AV., FIRST FLOOR, Suite 1—Irene, a little French girl, 18, will treat a few select gentlemen at above number.

MRS. DR. JULIA A. YALE is now located at 400 W. Madison-st., top floor; hours 9 A. M., to 10 P. M.; open Sundays.

346 W. MADISON-ST., UPSTAIRS—Miss Minnie, a French lady, late of New York; first-class treatments.

MASSAGE.

A YOUNG WIDOW WILL GIVE MASSAGE and magnetic treatments to select parties. Address, with stamp, *Z* 173, The Dispatch.

Government Exhibit 3.

ADVERTISEMENTS MARKED IN BLUE PENCIL IN GOVERNMENT EXHIBIT 3 ARE THE FOLLOWING:

PERSONAL.

PERSONAL—Elderly gentlemen with young wives, "middle-aged men" who feel a weakness beyond their years, and young men who have committed excesses and errors, find in "Vigorola" and "Santao" the only always reliable, always effective remedies, which never fail to benefit promptly and effect a permanent cure when the full treatment is taken.

"Vigorola" improves the memory, brightens the intellect, steadies the nerves, and restores lost sexual strength. It restores the full enjoyment of sexual vigor and rejuvenates all youthful powers. Its efficacy is a delightful surprise to the afflicted and the demand is increasing with astonishing rapidity.

"Santao" increases the circulation in and strengthens the parts, develops undeveloped or shrunken parts, cures varicocele, lessens night emissions and cures premature discharges by contracting, soothing and strengthening the distended and irritated seminal vesicles, thus securing the normal condition in ejaculation, and lessening the danger of loss of semen by emission or oozing away.

The "combination treatment" consists of "Vigorola" taken internally and "Santao" applied externally. It is a combination which is capable of rectifying and curing

all disorders of the sexual system and is positively unequaled by any treatment or system in its effects. It is the only rational, common sense method and it appeals to the reason. It is pleasant, speedy and, best of all, always effectual.

Pamphlets free to any address; advice free; business confidential.

Price of either remedy, $2.00 per bottle, or three bottles for $5.00. Price of full combination treatment, $10.00. Open evenings and Sundays.

DR. H. T. MILLER, 21 Quincy-st., Chicago.

PERSONAL—"Regulator Tablets" are safe, reliable and always effective; tansy or pennyroyal are not to be compared with these scientifically compounded tablets, which never fail and never disappoint; they are incomparable and are used by thousands of ladies with the highest degree of satisfaction; the demand is rapidly increasing, as ladies tell each other they have at last found a "regulator which regulates"; price, extra strong, $2 per vial; mailed sealed. Mrs. Dr. H. T. Miller, 21 Quincy st., Chicago. Open evenings and Sundays.

PERSONAL—A young country girl from the rural districts, recently from school, wishes to meet a refined gentleman during her stay in the city. 54 S. May-st., Room 12, second flat.

PERSONAL—A young widow, affectionate nature, with no one but herself, wishes to meet a gentleman who would appreciate those qualities. 54 S. May-st., Room 15, second flat.

PERSONAL—Miss Wilson, formerly of 379 W. Madison st.; a young blonde of loving disposition, would like to meet a refined gentleman. 352 W. Madison-st., first floor, front.

PERSONAL—Miss Volkman, a German lady, with her sister, who is only a few days from Germany, would like to meet refined gentlemen. 518 Wabash-av., over grocery store.

PERSONAL—A nice young man, plenty of money, wishes acquaintance of pretty young girl; no professional. Address, in strict confidence, P. 158, The Dispatch.

PERSONAL—Miss Lulu, a nice, refined, handsome young lady, would be pleased to see a pleasant gentleman. Room 3, 204 E. Washington-st.

PERSONAL—A little Jewish lady, not quite 19, stranger in the city, wishes to meet a gentleman who would appreciate refinement. 414 W. Madison-st., first flat, right.

PERSONAL—Lady in her own home, West Side, would rent to discreet transients; also room to gentleman, with privileges. Address P 34, The Dispatch.

PERSONAL—A young lady having a cozy home and all alone would rent suite of parlors to one very nice, quiet gentleman. 2352 State-st., second flat.

PERSONAL—Miss Pauline Hall, 540 Wabash-av., flat 3—First-class treatments; assisted by Miss Lizzie, a refined English girl; friends please call.

PERSONAL—Grace Norris, 275 W. Madison-st.—Two prepossesing young ladies, strangers in the city, would like to meet two gentlemen of means.

PERSONAL—Quiet, desirable quarters for exclusive couples as requested; ladies' private dwelling; fitting location. Address P 150, The Dispatch.

PERSONAL—1518 Wabash-av., First floor, Suite 1—Dollie, a little English girl (18), would like to make the acquaintance of a refined gentleman.

PERSONAL—A novel entertainment will be given by a company of young ladies assisted by the only Blineau. 2010 State-st., top floor, left.

PERSONAL—A voluptuous Jewish lady from Aurora wishes to meet a business gentleman. 2009 State-st., flat A.

PERSONAL—Wanted—Two bright young ladies at once; splendid chance. 536 Wabash-av., flat 1.

PERSONAL—A little brunette, just from school and of an inquisitive nature, wishes the acquaintance of a business gentleman. 1518 Wabash-av., first floor, suite 3.

PERSONAL—170 E. Indiana-st., near LaSalle-av.,—A young German blonde lady in her own home would like to make the acquaintance of a refined gentleman.

PERSONAL—The French Twins, Mabel and Toots De Ferras, lately of Paris, give French and Spanish treatments. 2010 State-st., top flat, left.

PERSONAL—Irene Darlington, late of San Francisco, wishes to make acquaintance of gentlemen; up-to-date treatment. 353 W. Madison-st.

PERSONAL—Should discreet gentleman desire intimate acquaintance of lady who for certain reasons prefers to withhold her identity, please address R. 193. The Dispatch.

PERSONAL—1518 Wabash-av., first floor, suite 1—Trixy, a little Jewish girl, 18, stranger, would like the acquaintance of a refined gentleman.

PERSONAL—Young Jewess (artist's model) out of employment till Sept. 1st, desires to meet a business gentleman. Miss Jacobs, 496 Madison-st., one flight, rear flat.

Government Exhibit 4.

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PERSONAL—"Regulator Tablets" are safe, reliable and always effective; tansy or pennyroyal are not to be compared with these scientifically compounded tablets, which never fail and never disappoint; they are incomparable and are used by thousands of ladies with the highest degree of satisfaction; the demand is rapidly increasing, as ladies tell each other they have at last found a "regulator which regulates;" price, extra strong, $2 per vial; mailed sealed. MRS. DR. H. T. MILLER, 21 Quincy-st., Chicago. Open evenings and Sundays.

PERSONAL—A young widow, affectionate nature, with no one but herself, wishes to meet a gentleman who would appreciate those qualities. 54 S. May-st., Room 15, second flat.

PERSONAL—A little Jewish lady, not quite 19, stranger in the city, wishes to meet a gentleman who would appreciate refinement. 414 W. Madison st., first flat right.

PERSONAL—Miss Volkman, a German lady, with her sister, 19, only a few days from Germany, wish to meet two refined gentlemen. 518 Wabash av., over grocery store; always home.

PERSONAL—A young, auburn-haired widow, just from New England, wishes to meet an appreciative gentleman. 554 W. Madison st., first flat, front.

PERSONAL—A young Jewish lady, stranger, wishes the acquaintance of a select gentleman, who would appreciate refinement. 554 W. Madison st., first flat, front.

PERSONAL—A young lady having a cozy home, and all alone, would rent suite of parlors to one very nice, quiet gentleman. 2352 State st., second flat.

PERSONAL—A young lady with cozy flat will rent nicely furnished front room to a gentleman; home comforts; no other roomers; 2350 State st., first flat.

PERSONAL—Irene Darlington, late of San Francisco, wishes to make acquaintance of gentleman; an up-to-date lady. 353 W. Madison st.

PERSONAL—GET MARRIED—McDonnell's Matrimonial Agency, 155 W. Madison st., can suit you; call or write for free list; established 1880; open every day.

PERSONAL—Miss Pauline Hall, with an up-to-date lady friend, gives treatments of all kinds; always at home; don't mistake number. 540 Wabash-av., first floor, flat 3.

PERSONAL—Miss Hilda, a handsome young Swede, just arrived from Stockholm, gives the mammary treatment. 2010 State-st., top flat, left.

PERSONAL—Two sisters, a blonde and brunette, aged 22 and 18 years, good figures, would like to make the acquaintance of two gentlemen. Address D 43 The Dispatch.

PERSONAL—1518 Wabash-av., first floor, suite 1—Dollie, a little English girl (18), would like to make the acquaintance of a refined gentleman.

PERSONAL—A novel entertainment will be given by a company of young ladies assisted by the only Blineau. 2010 State-st., top floor, left.

PERSONAL—A little Jewish lady, stranger, just from the south, wishes to meet business gentleman. 479 W. Madison-st., first flat, left.

PERSONAL—Married ladies, a safe and harmless preventative; no drugs; no rubber; no annoyance; sure. Address V. 169, Dispatch.

PERSONAL—Mrs. Silver will give the knead treatment with her little friend, a Japanese lady. 2006 State-st., top flat.

PERSONAL—A nice-looking young blonde would like to meet a courteous gentleman. 2004 Wabash-av.

PERSONAL—A voluptuous Irish girl from Aurora wishes to meet a business gentleman. 2009 State-st., flat A.

PERSONAL—A tall, handsome lady, stranger, wishes to to meet a refined gentleman. 2008 State-st., first flat, right.

PERSONAL—317 W. Madison-st.—The Spanish lady of 285 Madison-st. is located at above number. May Kline, assistant.

PERSONAL—I spent hundreds of dollars on patent medicines and quacks before I found a natural cure for SECRET DISEASES, such as gonorrhea, gleet, whites or lucorrhea in either sex; no smarting pain; no inconvenience; IT ALSO ACTS AS A PREVENTIVE; I have nothing to sell you, but will write you what cured me if you send self-addressed envelope to P. 189, The Dispatch.

PERSONAL—Men wanted who are now suffering from nervous, mental or physical prostration to send for our new 48-page illustrated book, "Complete Manhood"; sent free on application. Address Erie Medical Co., Buffalo, N. Y.

PERSONAL—The French twins, Mable and Toots De Ferras, lately of Paris, give French and Spanish treatments, 2010 State-st., top flat left.

PERSONAL—1518 Wabash-Ave., first floor, suite 1—Trixy, a little Jewish girl, 18, stranger, would like the acquaintance of a refined gentleman.

PERSONAL—Young Jewess (artist's model) out of employment till Sept. 1st, desires to meet a business gentleman. MISS JACOBS, 196 Madison-st., one flight, rear flat.

PERSONAL—Two young ladies, blonde and brunette, stylish and up to date, wish the acquaintance of two gentlemen. 1518 Wabash-av., first floor, suite 3.

PERSONAL—A young Jewish lady, not quite 19, living alone, will be pleased to meet elderly gentlemen; pleasant time. 265 W. Randolph-st., second flat.

PERSONAL—Select couples requiring clean, private quarters in quiet, respectable location, for temporary use, ad. S 170, Dispatch.

PERSONAL—WANTED—A bright young lady boarder; blonde preferred. BELL WOODS, 1518 Wabash-av., first floor, suite 3.

PERSONAL—Georgie Valcourt gives mamary and magnetic treatment. 629 Madison-st., first flat.

PERSONAL—Miss Mabel Dexter, manicure, of 240 Wabash-av., now 9 Jackson-st.

PERSONAL—Hotel Garni, 40 and 42 Fifth-av.; rooms, 50c, 75c, and $1.

PERSONAL—Jennie Carter is now at 301 Randolph-st., room 3; friends please call.

BATHS.

1518 WABASH-AV., FIRST FLOOR, 1518
Suite 3. BELL WOODS will now be permanently located at above number; patrons please call.

1518 WABASH-AV., FIRST FLOOR, SUITE 1—Irene, a little French girl, 18, will treat a few select gentlemen at above number.

346 W. MADISON-ST., UPSTAIRS—Miss Minnie, a French lady, assisted by a Spanish lady; first-class treatments.

618 W. MADISON-ST. 618

Leo Leslie gives first-class treatments, assisted by a young southern lady.

Government Exhibit 5.

ADVERTISEMENTS MARKED WITH BLUE LEAD PENCIL IN GOVERMMENT EXHIBIT 5 ARE THE FOLLOWING:

PERSONAL.

PERSONAL—Elderly gentlemen with young wives, "middle-aged men" who feel a weakness beyond their years, and young men who have committed excesses and errors, find in "Vigorola" and "Santao" the only always reliable, always effective remedies, which never fail to benefit promptly and effect a permanent cure when the full treatment is taken.

"Vigorola" improves the memory, brightens the intellect, steadies the nerves, and restores lost sexual strength. It restores the full enjoyment of sexual vigor and rejuvenates all youthful powers. Its efficacy is a delightful surprise to the afflicted and the demand is increasing with astonishing rapidity.

"Santao" increases the circulation in and strengthens the parts, develops undeveloped or shrunken parts, cures varicocele, lessens night emissions and cures premature discharges by contracting, soothing and strengthening the distended and irritated seminal vesicles, thus securing

the normal condition in ejaculation, and lessening the danger of loss of semen by emission or oozing away.

The "combination treatment" consists of "Vigorola" taken internally and "Santao" applied externally. It is a combination which is capable of rectifying and curing all disorders of the sexual system and is positively unequaled by any treatment or system in its effects. It is the only rational, common sense method and it appeals to the reason. It is pleasant, speedy and, best of all, always effectual.

Pamphlets free to any address; advice free; business confidential.

Price of either remedy, $2.00 per bottle or three bottles for $5.00. Price of full combination treatment, $10.00. Open evenings and Sundays.

DR. H. T. MILLER, 21 Quincy St., Chicago.

PERSONAL—men only—I will gladly send to any man, young or old, the receipt, with full directions, in plain sealed envelope, that cured me of lost manhood, impotency, varicocele, sexual weakness, etc., and greatly enlarged my small, shrunken sexual organs, which was the result of self-abuse and sexual excesses. Address, with stamp, in confidence. C. J. Walker, Box 937; Kalamazoo, Mich.

PERSONAL—"Regulator Tablets" are safe, reliable and always effective; tansy or pennyroyal are not to be compared with these scientifically compounded tablets, which never fail and never disappoint; they are incomparable and are used by thousands of ladies with the highest degree of satisfaction; the demand is rapidly increasing, as

ladies tell each other they have at last found a "regulator which regulates;" price, extra strong, $2 per vial; mailed sealed. Mrs. Dr. H. T. Miller, 21 Quincy St., Chicago. Open evenings and Sundays.

PERSONAL—138 E. Twenty-second St., upstairs, between Wabash and Michigan Avs.—Refined German lady, in her own home and all alone, wishes to form the acquaintance of a gentleman. Clara Blank.

PERSONAL—Refined, cultured gentleman of 44, stranger, wishes to meet pretty, attractive young lady under 25, who could appreciate a good friend; letters confidential; no professionals. Address C 99, The Dispatch.

PERSONAL—A little Creole lady, Miss Kitty, the Danish lady, from Milwaukee, and Miss Eva, Parisian lady, are still located with Mrs. Silva (Spanish), 2006 S. State.st., top floor, left.

PERSONAL—Two young business men desire acquaintance of refined, prepossessing employed blonde and brunette; others hush. Address G 61, The Dispatch.

PERSONAL—A young widow, refined, educated, living in cozy flat, quiet location, would entertain discreet business gentleman afternoons or evenings. Address O 19, The Dispatch.

PERSONAL—A young lady having a cozy home and all alone would rent suite of parlors to one very nice, quiet gentleman. 2352 State-st., second flat.

PERSONAL—A young German lady (blonde) wishes to make the acquaintance of a refined gentleman. 185 E. Chicago-av., near Wells.

PERSONAL—French twins, Mabel and Toots De Ferras; French, Spanish and Corean treatments; idiosyncracies a specialty. 2008 State-st., top flat, right.

PERSONAL—A young widow of affectionate nature, all alone, wishes to meet an appreciative gentleman. 352 W. Madison-st., first floor, flat 2.

PERSONAL—Miss Volkman, a German lady, with her sister, 19, wish to meet two refined gentlemen. 518 Wabash-av., upstairs; always home.

PERSONAL—Two young widows in their own home (red hair and brunette) wish to meet two appreciative gentlemen. 554 W. Madison-st., first flat, front.

PERSONAL—Miss Hilda, the handsome blonde, exact counterpart of Della Fox, will be pleased to meet a refined gentleman. 2010 State-st., top flat, left.

PERSONAL—1518 Wabash Ave., first floor, suite 1, a pretty little brunette, just 18, would like to meet a refined gentleman.

PERSONAL—Lucille Davenport, an up-to-date lady; Corean treatments. 629 W. Madison st., first flat.

PERSONAL—Young country girl, home life not agreeable, desires acquaintance of a gentleman. Address E., 86 The Dispatch.

PERSONAL—Gentleman wishing to meet refined private ladies for pleasant time address M., 22, The Dispatch.

PERSONAL—Tall, handsome lady, magnificent form, wishes to meet a refined gentleman. 2008 State st., first flat, right.

PERSONAL—Jolly little blonde widow (21), desires acquaintance of liberal gentleman. Address H., 68, The Dispatch.

PERSONAL—Gentlemen wishing to meet refined private ladies for a pleasant time, address M 22, The Dispatch.

PERSONAL—1518 Wabash-av., First floor, suite 1—Dollie, the little English girl, has returned; will be pleased to see her friends.

PERSONAL—89 LaSalle-av., near Indiana-st.—A young German lady (brunette), alone, wishes to meet a business gentleman.

PERSONAL—A handsome young girl wishes to meet a nice gentleman. 204 E. Washington-st.

PERSONAL—A quiet young lady not used to city life wishes to meet a refined gentleman. 352 W. Madison-st., first floor, flat 1.

PERSONAL—1518 Wabash-av., First floor, suite 3—Trixie, the little Jewish girl, will now be permanently located at above number; friends call.

PERSONAL—A pretty little blonde and brunette, not quite 19, wish to make the acquaintance of two gentlemen. 1518 Wabash-av., first floor, suite 3.

Government Exhibit 8.

ADVERTISEMENTS MARKED WITH BLUE PENCIL IN GOVERNMENT EXHIBIT 8 ARE THE FOLLOWING:

PERSONAL.

PERSONAL—Elderly gentlemen with young wives, "middle-aged men" who feel a weakness beyond their years, and young men who have committed excesses and errors, find in "Vigorola" and "Santao" the only always reliable, always effective remedies, which never fail to benefit promptly and effect a permanent cure when the full treatment is taken.

"Vigorola" improves the memory, brightens the intellect, steadies the nerves, and restores lost sexual strength. It restores the full enjoyment of sexual vigor and rejuvenates all youthful powers. Its efficacy is a delightful surprise to the afflicted and the demand is increasing with astonishing rapidity.

"Santao" increases the circulation in and strengthens the parts, develops undeveloped or shrunken parts, cures varicocele, lessens night emissions and cures premature discharges by contracting, soothing and strengthening the distended and irritated seminal vesicles, thus securing the normal condition in ejaculation, and lessening the danger of loss of semen by emission or oozing away.

The "combination treatment" consists of "Vigorola" taken internally and "Santao" applied externally. It is a combination which is capable of rectifying and curing all disorders of the sexual system and is positively unequaled by any treatment or system in its effects. It is

the only rational, common sense method and it appeals to the reason. It is pleasant, speedy and best of all, always effectual.

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Price of either remedy, $2.00 per bottle, or three bottles for $5.00. Price of full combination treatment, $10.00. Open evenings and Sundays.

DR. H. T. MILLER, 21 Quincy St., Chicago.

PERSONAL—Men only; I will gladly send to any man, young or old, the receipt, with full directions, in plain sealed envelope, that cured me of lost manhood, impotency, varicocele, sexual weakness, etc., and greatly enlarged my small, shrunken sexual organs, which was the result of self-abuse and sexual excesses. Address, with stamp, in confidence, C. J. Walker, box 937. Kalamazoo, Mich.

PERSONAL—2008 State st., Top flat, right—Blineau and the French Twins, Mabel and Toots De Ferras, in their latest entertainment; also French, Spanish, Corean and mammary treatments; idiosyncrasies a specialty.

PERSONAL—"Regulator Tablets" are safe, reliable and always effective; tansy or pennyroyal are not to be compared with these scientifically compounded tablets, which never fail and never disappoint; they are incomparable and are used by thousands of ladies with the highest degree of satisfaction; the demand is rapidly increasing, as ladies tell each other they have at last found a "regulator which regulates;" price, extra strong, $2 per vial; mailed sealed. Mrs. Dr. H. T. Miller, 21 Quincy st., Chicago, Open evenings and Sundays.

PERSONAL—Mrs. Cecil Raymond, young widow from the south, loving disposition, would like to meet a gentleman. 496 W. Madison-st., 1st flight, front flat.

PERSONAL—89 LaSalle-av., near Indiana-st., a refined young German widow wishes to make the acquaintance of a business gentleman.

PERSONAL—Trixy, the little Jewess, will now be located at 1518 Wabash-av., first floor, suite 3; assisted by Alice and Blanche; friends call.

PERSONAL—Young lady living alone in her own private home would like the assistance of an elderly gentleman. Address X, 99, The Dispatch.

PERSONAL—Young widow, stranger, with young lady of 19, wishes to meet two refined gentlemen. 679 W. Lake-st., TOP FLAT; right at Wood-st. station.

PERSONAL—Miss Hilda, the handsome blonde, exact counterpart of Della Fox, will be pleased to meet a refined gentleman. Removed to 2006 State-st., first flat, left.

PERSONAL—A jolly young Irish girl in her own flat wishes to meet a nice gentleman. 352 W. Madison-st., flat 2, first floor.

PERSONAL—A pretty little Mexican girl, 18, stranger, wishes to meet a select gentleman. 554 W. Madison-st., first flat.

PERSONAL—Miss Lillian Walsh is not at 88 any more; will now find her at 164 Custom House-pl.; friends call.

PERSONAL—Two nice-looking ladies, blonde and brunette, wish to meet two business gentlemen. 2012 State-st., first flat, right.

PERSONAL—The little Japanese and her little Indian friend give the Hindoo treatment. 2006 State-st., top floor, left.

PERSONAL—A little Jewess, 19, stranger, wishes to meet a gentleman. 414 W. Madison-st., first flat, right.

PERSONAL—Miss Grete, a nice young German lady (19) would like to see a refined gentleman. 145 E. Huron-st., near Wells, first floor.

DR. PARVINOT'S (Paris, France), Female Tablets; latest clinical success; harmless and safe; effect that of a blood tonic; no pennyroyal, no tansy, no other injurious plant extract; the only remedy used by the medical profession; price $2 a box. Colbert Chemical Co., (sole agents), n. e. cor. Monroe and Dearborn-sts.

PERSONAL—A gentleman of means would like to meet an attractive young lady standing alone; professionals not noticed. Address X 19, The Dispatch.

PERSONAL—1518 Wabash-av., first floor, suite 3—Two young country girls, 18, blonde and brunette, would like to meet two business gentlemen.

PERSONAL—A young German lady (blonde) wishes to make the acquaintance of a refined gentleman. 185 E. Chicago-av., near Wells-st.

PERSONAL—Tall handsome lady, magnificent form, wishes to meet a refined gentleman. 2128 State-st., third floor, front.

PERSONAL—A young widow and her sister wish to meet two refined gentlemen. 352 W. Madison-st., first floor, flat 1.

PERSONAL—Lucille Davenport, an up-to-date lady; Corean treatments. 629 W. Madison-st., first flat.

PERSONAL—A young traveling man wants acquaintance of working girl or widow. Address O 33. The Dispatch.

BATHS.

1608 Wabash-av., 2d floor, suite 3—A refined 1608 young widow living in her own home will give baths and massage to refined gentleman; Miss Rose LaCroix in attendance; pleased see old friends; also new ones.

476 W. Randolph-st., top flat—First-class bath and magnetic treatments given by two young ladies from the south; open from 10 a. m. to 7 p. m.

165-486
165-486

IN THE

Supreme Court of the United States.

October Term, 1896.

No. 472.

JOSEPH R. DUNLOP, Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Northern District of Illinois.

Additional Brief for Plaintiff in Error.

W. S. FORREST,
A. H. GARLAND,
R. C. GARLAND,
For Plaintiff.

Supreme Court of the United States.

OCTOBER TERM, 1896.

JOSEPH R. DUNLOP, Plaintiff in Error,
vs.
THE UNITED STATES.
No. 472.

In Error to the District Court of the United States for the Northern District of Illinois.

Additional Brief for Plaintiff in Error.

We beg leave to file, on the part of the plaintiff in error, an additional brief to the one filed for him on the 19th of October last (by Mr. Forrest). That brief contains a full and complete statement of the case as it was begun, prosecuted, and tried in the court below, and presents clearly the points for consideration here, and this will merely elaborate some of these points, offering, in some instances, other and additional authorities to sustain the positions taken in it.

The case is, in all respects, an important one, involving a number of serious questions, and, to a great extent, it is novel in our law.

Points I and II, page 35, of the brief referred to, touch questions as to the admissibility of the testimony of McAfee and Montgomery, and the objection is based upon the fact that the papers, exhibits in this case, were not identified, but it was left to the jury to assume these were identified, because other copies of the dispatch had

been. It was assuming the existence of facts not proved, and allowing this testimony, as claimed by plaintiff, is erroneous. (*Bouv. L. Dic., Tit. Jury, p. 27; Best Prl. Ev.* (Chamberlayne ed.), pp. 80, 81.

This was error for the further reason, as was the admissibility of testimony, to show from July 6, 1895, to October 19, 1895, a newspaper purporting to be the Chigago *Dispatch*, was received in great quantities at the Chicago post-office for mailing and delivery (point III, pp. 40–44 of brief); that it was an attempt to convict a person for acts different and apart from those charged, and having no necessary connection with them. The courts have repeatedly discountenanced this proceeding in terms not to be misunderstood. As a rule of evidence to prove the particular fact alleged as charged, it meets with no favor.

Thompson v. *Bowie*, 4 Wall., 463;
1 Phil. Ev., p. 143; 1 Greenl. Ev. (*14 ed.*, § *52*;
The State v. *Fields*, 14 Maine, 249;
Odiorne v. *Winkley*, 2 Gall., 51–3;
Jackson v. *Smith*, 7 Cow. (N. Y.). 717;
Iron Mountain B'k v. *Murdoch*, 62 Mo., 70.
Lewis v. *Smith*, 107 Mass., 334;
Cutter v. *House*, 122 Mass., 541.

In the language of this court in *Boyd* v. *U. S.* (142 U. S., 458), these facts "were collateral to the issue to be tried." "No notice was given by the indictment of the purpose of the Government to introduce proof of them; they afforded no legal presumption or inference as to the particular crime charged," etc. "The defendants were entitled to be tried upon competent evidence, and only for the offence charged."

These considerations apply directly to the IV., V., and VI. points (Brief, pp. 43–53). The court will observe as to the view expressed on pp. 48, 49 of the brief as to mailing, it simply claims what the statute under which

this proceeding is had, asserts. There must be an actual mailing or posting by the party charged, and no words or acts can supply this, for it is the statute, and it must be construed strictly and not by assumption or implication, and the various cases upon this statute so hold, outside of that universal rule as to construing criminal statutes.

U. S. v. *Bott*, 11 Blatch., 346;
U. S. v. *Foote*, 13 *ib.*, 418;
U. S. v. *Kelly*, 3 Sawyer, 560.

"As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit."

Swearingen v. *U. S.*, 161 U. S., 451.

And it may be remarked, that in these matters, the trial judge seemed to be oppressed with the delusion, that a newspaper proved itself, was evidence of and by itself as an official document, which is quite erroneous; indeed, nothing could be more so under the well-founded and well-recognized rules of evidence.

Wharton Ev., 674 (a);
Sweighart v. *Lowmater*, 14 S. and R. (Pa.), 200;
Ring v. *Huntington*, 1 Mill. (S. C.), 162;
Fosgate v. *Herkimer*, 9 Barb. (Sup. Ct.), 287.

The VIII. point in the brief, page 54, rests upon the court's giving an instruction based upon no proper or legal evidence. As to this evidence, we have discussed it heretofore on the I. and II. points of the brief on file. And that evidence being illegal, the instruction is without facts to stand upon, and must be ruled out.

Davis v. *Patrick* (122 U. S., 138);
Jones v. *Randolph* (104 *ib.*, 108);
R. R. Co. v. *Houston* (95 *ib.*, 697).

And this applies as well to the IX. point made in the brief, page 55.

These being true, the objection to the court's instruction as to finding by the jury upon these facts, established by illegal testimony (X. point, brief, p. 56), is well taken. To admit improper testimony and then tell the jury to consider all these facts together, is putting it rather severely on the plaintiff in error; and, to state it moderately and modestly, it is a begging of the question by the court; and what the court there says of reasonable doubt will be considered further on, and we think it will be seen that part of the charge is wrong.

And in support of the theory of the brief (XI. point, p. 58), as to reasonable doubt, we beg to cite *Webster* v. *Commonwealth* (5 Cush., 319, 320,) as laying down the true rule adopted by all courts and text writers since; and it is submitted, most respectfully, that it sustains to the letter the contention of the plaintiff in error in this regard. "The burden of proof is on the prosecution," and "the circumstances taken as a whole should, to a *moral certainty*, exclude every other hypothesis." Dunlop did not have the benefit of this law, nor its substance; but he is entitled to it.

The court below manifestly misled the jury in its instruction as to what is obscene, lewd, etc., and as contended for by plaintiff under XIII. point, p. 65 of the brief. It is claimed that the true test of what constitutes obscene literature is that which tends to deprave the morals by exciting sensual desires—*sexual impurity;* and besides the cases cited in the brief to sustain this position, the last utterances of this court on this subject so say, in just so many words.

Rosen v. *U. S.*, 161 U. S., 29.
Swearingen v. *U. S.*, *ib.*, 450–1.

The court, in passing on this, roamed largely over that indefinite and almost indefinable field of morals

and even civilization, and its language could only mystify and obfuscate the subject in the minds of the jury.

More will be said in this connection hereafter, combined with other charges of the court, which form really the basis and the true ground-work of this proceeding and in connection with the language of the District Attorney in his address to the jury.

The brief calls special attention of the court to the refusal of the trial court to instruct the jury as to the presumption of innocence, and makes an argument, unanswerable, in support of the assignment of error in this respect (pp. 69–77.) This is an important point in this case and can not escape the closest consideration of the court. It is sustained by authorities cited in this brief all over the land, and in almost every shape the question can arise. Neither argument or citation can add to the force of the presentation here made, and it will be left with the court with this one suggestion: This presumption continues and attaches in every part and parcel of the case, from the beginning to the end, and it is so strong it operates as well against breach of duty and of morals, and the commission of fraud, as it does against the commission of crime. (*Starr* v. *Ieck*, 1 Hill, N. Y., 270, and cases cited) Shielded as Dunlop was and is by this presumption, it was open error in the court's refusal to give the instructions named in the brief. (P. 65, Point XV.)

Point XVIII, page 79 of the brief, puts a plain, legal proposition to the court, which was not recognized by it, and that is as to the presumption to be indulged against the Government in failing to produce an important witness on any substantial point involved in the case, when it was within the power of the Government to produce him. The authorities to support this position are almost

numberless, some of which are given in the brief, and the reason and argument therefor are fully stated therein.

Marvin v. *Ward*, 15 Conn., 377;
McDonough v. *O'Niel*, 113 Mass., 92;
Wallace v. *Harris*, 32 Mich., 380;
Miller v. *Jones*, 32 Ark., 337;
Frick v. *Barton*, 64 Pa. St., 120;
Dongin v. *Danville*, 47 Vt., 95, 105;
The Tille, 7 Benedict, 382;
Bleeker v. *Johnson*, 69 N. Y., 309;
Williams v. *Commonwealth*, 37 Leg. Int., 85.

The brief, point XXI, page 85, takes exception to language of the District Attorney, uttered in a moment of great zeal, as to his conviction about what any twelve men, unbought and unperjured, would decide as to indecency, lewdness, etc. This was so inflammatory and so out of order the court ruled it out, and expressed the hope "it would not occur again," or words to that effect; thereupon the District Attorney withdrew the observation. (Rec., 116.) But it had gone to the jury, and had lodged in their minds, from a very high official acting for the Government under oath. This court has, on more occasions than one, expressed its deep disapprobation of remarks of this character by counsel, and sometimes by courts, before juries. (*Wilson's Case*, 149 U. S., 60; *Hall's Case*, 150 *ib.*, 76; *Graves' Case*, *ib.*, 118; *Starr's Case*, 153 *ib.*, 14; *Allison's Case*, 160 U. S., 203.) As seen, so obviously improper and out of place, and prejudicial to Dunlop, was this declaration of the prosecuting officer the court repudiated the effort, and the District Attorney, also, in his cooler moments, withdrew it. But that did not cure the trouble, for the evil had been done, and it was incurable, and this is settled by courts of the highest standing.

In *People* v. *Evans* (*72 Mich., 267*), is to be found this:

"*The error was not cured by the court afterwards instructing the jury that they should not consider such argument. Counsel for respondent calls our attention to a recent case in Illinois fully sustaining this doctrine. The statute of Illinois provides that:*

"'*A defendant in any criminal case or proceeding shall only, at his own request, be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference to be made to or upon such neglect.*'

"*In Quinn* v. *People* (*123 Ill., 333; 15 N. E. Rep., 46*), *counsel had assumed to comment on defendant's failure to testify in his own behalf; and the Supreme Court of Illinois, considering that case, say:*

"'*How much did it avail for the court to tell the jury that the remarks of counsel were improper? His words had found a lodgment in the minds of the jury, spent their force, and subserved the purpose for which they were uttered, and it were idle talk about removing their effect upon the jury by a mere declaration from the court that they were improper. As well might one attempt to brush off with the hand a stain of ink from a piece of white linen. One, in the very nature of things, is just as impossible as the other.*'

"*It can not matter whether these safeguards are thrown around the accused by statute or by common law, to the end that we have fair and impartial trial. It was gross error for the prosecution to indulge in such remarks, and the error was not cured by the charge of the court.*'"

So careful and cautious are the courts to protect a party in his right to a fair trial, and to see that one is had, at all risks, it is settled that even when illegal testimony is admitted, the error is not relieved by the court charging it out of the case, and nothing is needed to show the wisdom of such ruling.

State v. *Frooks*, 29 Kansas, 420;
Hale v. *Jones*, 55 Vt., 207;
Taylor v. *Adams*, 58 Mich., 187;
Cummins v. *Leighton*, 9 Ills. (App.), 186.

Massage!

Exception is saved to the somewhat loose and undigested talk of the District Attorney in defining what massage is, as some of the alleged literature relates to that subject. (Rec., 79.) The court, intending, it is supposed, to relieve the District Attorney as to this, affirmed his language in these not very clear and helpful words:

"Well, I suppose massage, like walking, is so well known that everybody knows what it is. I do not suppose there would be any harm in the District Attorney stating what walking is."

The highly objectionable language of the District Attorney in this behalf is this:

"Now, gentlemen, it is not necessary for me to tell you what the massage treatment is—how a man is stripped naked from the sole of his feet to the top of his head and rubbed with the hands." (Assignment of Errors 37 and 38, Rec., 116; Bill of Exceptions, Rec., 79.)

The District Attorney and the court trying the case may have known, by some means or other, what *massage* meant; but we will be pardoned if we insist it is not a matter of such common knowledge that the court knows it judicially, or must take notice of it any how; by no means! In *Best Pr'l Ev.* (Chamberlayne ed.), *note f*, under proper title, a long list of subjects is recorded of which courts are said to take judicial cognizance, but massage is not one of them, nor any subject cognate thereunto, or anything else running in the line of remedies for, or alleviations or gratifications of human bodily afflictions or appetites. And when the District Attorney undertook to tell what it was, he faltered and lost his way; and so, when the court came to his aid and likened it in general knowledge to walking, he, too, was where Moses is said to have been when the light went out; and all this

simply misled the jury and took from them a part of their duty to know and determine upon facts, what this term meant and wherein, as touching this case, it was an assault upon the Postal Statute (R. S., 3893).

Recent large and ponderous volumes of Webster, Worcester and other lexicographies have not the word *massage*, as common as it is claimed to be, and familiar in knowledge as walking. The Standard Dictionary (1895) of the English language has it (vol. 2, p. 1087), and runs it back through the French to the Greek, *massō* to *knead*, and says, "it is used as the generic term for external manipulations, which are employed for the purpose of affecting the nervous and muscular system and the general circulation." Some French and English dictionaries, mixed, use it, and refer for its meaning to *sham-poo*, as being synonymous. The Standard Dictionary, already referred to, defines *sham-poo* thus: To lather, rub, and wash thoroughly the head, etc., to cleanse in a steam bath by rubbing the skin, and invigorate by *kneading* the muscles and pulling the joints.

In Wood's Therapeutics (1894, 9th edn.), page 20, *et seq.*, some six pages of closely-printed matter are devoted to this subject, defining and explaining it, and he shows it existed and was known in Greece and Rome long before Demosthenes thundered at Philip, or Cicero stormed at Cataline; the heathen Chinese also knew of it away back in the past, and Japan, to give the blind occupation, for a long while placed this work in their hands. The learned professor distinguishes this treatment into *general*, affecting the whole body, and *local* affecting certain points or parts of the body (p. 21), and he says: "When a male *masseur* is used for a female patient, motives of delicacy require covering." (*Ib.*) And he further says: "Without entering into a detailed discussion of the physiological action of *massage*, it is sufficient to state that it seems to me established that in general

conditions of lack of muscular tone, nervous exhaustion, and failure of the peripheral circulation, it is of *distinct value*, while in some bad diseases, affecting chiefly muscular tissues, *its influence is pronounced.*" * * *

"It is not, however, necessary for the operator to be, as some writers affirm, either a *lady* or a *gentleman*, or a highly-educated person." This disquisition is interesting and instructive, and might well have been produced and read to the jury to show them what there was about this scarecrow thrust before them, and that it is not so well known and understood as walking is, and that it is not rubbing a man stripped naked from the top of his head to his toes, and that it has been used from time immemorial by both men and women, and with great advantage, and that Miss Rose La Croix, *1608 Wabash Street, 2d floor, suite 3*, and the two young ladies from the South, *476 W. Randolph Street, top flat*, were by no means the first females who ever undertook this treatment, and that the *Dispatch* was not the only paper, by odds, that ever notified the world that persons, male and female, were ready to do this *kneading*. Then the jury did not have the best evidence before them on this matter, and in fact, had no evidence, only the incorrect statements of the judge and the District Attorney, on terms technical and not of their profession.

Without the least desire or intention to reflect on or detract from the judge or the District Attorney, there were better sources of information on this question than their mere statements, and the jury, under elementary principles of law, were entitled to the benefit of them. "The people are presumed, bound indeed, to know the law, but not philosophic or scientific facts and principles."

Ansman v. *Veal*, 10 Ind.; 355.

We will return somewhat to *Massage* when we come to notice the meaning of the words of the statute under which the indictment is found.

Obscene, Lewd, Lascivious.

This court has said in the last case touching this subject, *Swearingen* v. *United States* (161 U. S., 450), these words used in the statute describe one and the same offense; they signify that form of immorality which has relation to sexual impurity; and that it is highly penal, and should not be held to embrace language unless it is fairly within its letter and spirit. The alleged offensive article in the *Swearingen Case* was confessedly coarse and vulgar—strikingly so. But it was held not to come under the provisions of this mailing law. Tested by this decision, and we will not annoy the court by citations on this question, as this is quite recent and upon the very point, we submit, with the profoundest respect, there is no offense charged, nor one proved.

See—

United States v. *Harman*, 34 Fed. R., 872.

It would be too tedious to go through the different items set forth by the Government as objectionable in exhibits, and they will be found on the 28-page appendix to the brief referred to, and we beg the court's best attention and most searching scrutiny as to them. They will be noticed somewhat more fully in the oral presentation of this case. We have referred to two as to *Massage* already; and we insist, with perfect confidence, the rest are no more indecent or indelicate than are those two. From the mass of them take two or three samples:

Page 17, Appendix of brief: "*Personal. 1518 Wabash Avenue, first floor, suite 1. Trixy, a little Jewish girl, 18, stranger, would like the acquaintance of a refined gentleman*"!

A little girl, a stranger in a strange land, would like to meet a *refined* gentleman. It would puzzle to death the most morbidly moral person to tell wherein this is

improper or out of the way. She really wants to meet a *refined*—not a lewd or lascivious—man.

Same page: "*Personal. Young jewess (artist's model) out of employment till September 1, desires to meet a business gentleman. Miss Jacobs, 196 Madison Street, one flight, rear flat.*"

This young lady wants to see a business gentleman, not an idle loafer, and desires evidently to utilize her vacant time. We are not capable of finding anything obscene, lewd or lascivious in all this.

On page 7 Appendix of brief: "*(Baths) 512 W. Madison street, top flat, front. Miss Maud from Kentucky, assisted by Miss Blanche.*"

There is certainly nothing of an obscene, lewd, or lascivious nature in Miss Maud's giving baths, nor in her coming from Kentucky, nor in being assisted by Miss Blanche.

Thus run the balance on a par with these.

If these and others like them are offensive under the statute, similar ones are used, mailed and transmitted daily in the great papers of the land from the mountains to the seaboard. If these be condemned, what becomes of those advertisements we see so often, for wives and for husbands?

What is to be done with the vendors of dear, precious old *celery compound*, graced daily in the papers by the faces of noted men and women, one of the chief virtues of which is "to restore lost manhood?"

Eggs and oysters are classed as amatory food, and when they are advertised and sent to people the law is violated, for they will be carnally excited on seeing the mere mention of them!

Bulwer's dainty song—

"When stars are in the quiet skies
Then most I pine for thee," etc.,

that has thrilled the hearts of people over the world,

would be excluded from the mails, as its reading may arouse and stimulate bad thoughts!

"Meet me by moonlight," that so many lovers have innocently sent and sung to each other, is shut out of the mails?

"O whistle, and I'll come to you, my lad," one of Burns' sweetest, must never more darken the mail pouch because it, too, might bring forth evil thoughts and deeds?

What writing may not fall under the ruling made here?

To be excited or agitated over such publications as these, persons receiving and reading them must be oversensitive; indeed, they must have an acute attack of *erotomania*. They must be of that class of unnatural people discoursed of by Paul: *Rom., I: 24–26.*

What is there in them, but that ill-doing or evil construction that persons of certain temperaments and dispositions may and do conceive and attach to all writings and to all things in fact? This is not like the *Rosen case* (161 U. S., 29), where it needed only the rubbing a little bread upon the pictures sent to show what was obviously obscene, lewd, and lascivious. Here all is told in the writings or advertisements themselves; there is nothing hidden or underneath to tell more.

Edward III. picked up the garter of the Countess of Salisbury at a ball and placed it on his own knee, saying, *Honi soit qui mal y pense* (may he be shamed who evil thinks), or evil to him who evil thinks. And this is a proverb; it is the motto of one of the *grand* orders of Great Britain. It is a full explanation of what may be made out of these publications—these articles and notices here exhibited.

And does not the ardent and enthusiastic Apostle define it when he says: "I know and am persuaded by the

Lord Jesus that *there is* nothing unclean of itself; but to him that esteemeth anything to be unclean, to him *it is* unclean." (*Rom.*, XIV: *14.*)

Churches are often used for criminal purposes, but an advertisement that religious services will be had at them is not an immoral or criminal act.

A friend may loan another his gun to shoot rabbits with, and it may be used to kill a human being, but the loaning of it was not wrong or criminal.

A perversion of a thing from its purpose does not condemn the thing itself.

To what bad purposes these advertisements, fair, legitimate and legal in themselves, may be put to, makes no offence as to their publication and mailing. A bath is said to be one of the best appliances to the human system, for John Wesley says cleanliness is next to Godliness, and its advertisement and mailing is no offence whatever improper, indiscreet or unseemly things may be done at the bathing. You must connect the publisher and mailer closely in intention for the commission of these unseemly acts before he is guilty. But he is not indicted for that. Then the language itself not being culpable or not criminating, Dunlop is charged with no crime, none is proved against him. As nothing is proved, admitting all claimed by the prosecution beyond the words of the advertisements or publications, and it is shown you can not convict on the after fact or the subsequent discovered facts and make them relate back to criminate what was not criminal at first and of itself, the case falls.

Then no offense *per se* being charged, this court will hold the case must fail. There must be an offense charged.

Todd's Case, 158 U. S., 278;
Wiborg's Case, 163 *ib.*, 658.

While this question of an offense charged is always open before this court, yet here, as shown, Dunlop was cut off from demurring to the indictment by the court in compelling election and holding that the counts selected were good, but his motion in arrest (Rec., 32) preserves the objection, if a special exception be needed.

Not being charged with these supposed after occurrences, which might be claimed to make these publications vicious, they can not be proved against him.

Boyd's Case, 142 U. S., 458;
Swearingen Case and *Harman Case* (*Sup*).

The proof to make out the offense was inconclusive, and much of it illegal, as we have shown. And if the action of the court and the District Attorney, or both, in conducting the case even *might* have misled the jury, the case must be reversed, for this is a criminal statute, *highly penal*, and nothing goes under it by implication or inference.

Vicksburg v. *O'Brien*, 119 U. S., 99–103;
Wardell v. *Hughes*, 3 Wend., 416;
Inglish v. *Brenneman*, 5 Ark., 383; 3 Gra. & Wat. N. T., 707.

Only one other consideration appears necessary. In the first case regularly presented to this court under this particular statute (*Jackson, Ex parte*, 96 U. S., 727), it was held that while this power under the postal system of the United States could be exercised, it must not be done so as to interfere with the freedom of the press.

We suggest to this court, if this proceeding is not a most positive, direct, and injurious interference with that liberty, we will be a long, long while finding one. Papers after papers are stopped, examined, and withheld by unknown and irresponsible persons, and a system of espionage is established from point to point over this paper, with a circulation almost unexampled. And all

other papers with like or similar articles are subject to the same oppression. If this be permissible, then a system of inspection in the post-office affairs must be established to examine every paper that is issued and pronounce it mailable before it can be carried in the mails. Then there is much more—a great deal more, involved here than the mere question of whether Dunlop is guilty of producing "sexual impurity" by sending out advertisements in his paper.

And for all these reasons, we respectfully insist, this case should be reversed and a finale put to it here.

W. S. FORREST,
A. H. GARLAND,
R. C. GARLAND,
For Plaintiff.



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And for all these reasons, we respectfully insist, this case should be reversed and a finality put to it here.

W. S. Forrest,
A. H. Garland,
R. C. Garland,
For Plaintiff.

165-486

Office Supreme Court, U. S.
FILED.
DEC 17 1896
JAMES H. McKENNEY,
CLERK.

165-486

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

JOSEPH R. DUNLOP, PLAINTIFF in error,
v.
THE UNITED STATES.
No. 472.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Defendant was indicted on October 24, 1895, for unlawfully depositing, and causing to be deposited, on the dates set out in the various counts, in the post-office at Chicago, for mailing and delivery, a newspaper called the Chicago Dispatch, containing obscene, lewd, lascivious and indecent matters. There were thirty-two counts. (Rec., pp. 1 to 14.) The United States attorney was required by the court to elect six counts upon which he would proceed, and he elected to proceed upon the first, sixth, twelfth, sixteenth, twenty-sixth, and thirty-second counts. (Rec., pp. 20, 21.) These counts charge that said newspaper was so deposited on each of the fol-

lowing days, respectively, to wit: June 17, 1895; July 6, 1895; July 27, 1895; August 10, 1895; September 14, 1895, and October 19, 1895. (Rec., pp. 1–14.)

The proof showed that on August 30, 1894, McAfee and Mayer, post-office inspectors, called upon Dunlop at the Dispatch office, made complaint to him concerning the Dispatch, and that he said to them that he was the responsible head of that paper. They told him that complaints about the character of the paper had been submitted to the United States district attorney, who had directed them to advise him that, in his opinion, some of the advertisements under the head of "Baths" and "Personals" were illegitimate, and that the newspaper was within the inhibition of the postal laws and nonmailable. (Rec., pp. 38, 70.)

Dunlop said to Montgomery, who was talking to him in regard to the character of his paper—

> Mr. Montgomery, no other paper has made the success this one has, and it is only by this means that it has been possible to build the paper up in the short time that I have built it up. (Rec., p. 56.)

On June 12, 1895, McAfee addressed to the Dispatch of Chicago a letter (inclosing therein $1.20), as follows:

> ST. LOUIS, MO., *June 12, 1895.*
>
> The DISPATCH,
> *Chicago, Illinois.*
>
> Send Dispatch to R. M. Williams, box 801, St. Louis, Missouri, for three months from date; $1.25 enclosed.
>
> Yours, truly,
>
> R. M. WILLIAMS.
>
> (Rec., 47.)

He testified that he received by mail copies of the Dispatch of July 6, July 27, September 14, and August 10, 1895. (Rec., p. 46.) *These were the dates of the papers referred to respectively in the sixth, twelfth, sixteenth, and twenty-sixth counts of the indictment.* (Rec., pp. 4, 6, 8, 12.)

McAfee testified that after sending the letter he received, under the name of R. M. Williams, the paper regularly in his box in the St. Louis post-office building, *and that each of the four issues named were so received by him.*

These papers were marked, respectively, Government Exhibits 2, 3, 4, and 5, and are so spoken of in the record.

He testified that he took these papers from his box in the inspector's office in the post-office building, where he received all of his mail, and that the mail is put there by a messenger from the inspector's office. (Rec., pp. 47, 48.)

He subsequently received, in a stamped envelop, with the Chicago and St. Louis postmarks, and addressed to R. M. Williams, box 801, St. Louis, Mo., the following:

[The Chicago Dispatch, by Joseph R. Dunlop. Herman J. Huiscamp, treasurer, 115–117 Fifth avenue, Chicago.]

CHICAGO, *Sept. 15th, 1895.*

Mr. R. M. WILLIAMS,
Box 801, St. Louis, Mo.

DEAR SIR: Your subscription for the Dispatch expires August 13th, 1895. Kindly advise if you wish the paper continued, and oblige,

Very truly, yours,

JOSEPH R. DUNLOP.
E.

(Rec., p. 49.)

The box referred to was in the inspector's office in the post-office building, and the messenger was a letter carrier for that office, whose business it was to gather mail for the inspectors and distribute it. (Rec., p. 50.) It was his duty as a Government officer to bring the mail up into the office and put it into the box provided by the Government for each inspector's mail. (Rec., p. 51.) The witness did not see the papers deposited in his box, but had so gotton his mail for ten years. (Rec., p. 52.)

Montgomery, who was and for six years had been, superintendent of the mails at the Chicago post-office, and who had charge of the receipt and dispatch of all the mails in and out of Chicago, testified that the Chicago Dispatch had been passing through the post-office at Chicago for three or four years; *that he received a copy of the Chicago Dispatch of July 6, 1895, and the particular paper in evidence* (Government Exhibit 6), *between 5 and 6 o'clock in the Chicago post-office on the 6th day of July, 1895*, and identified it with the following memorandum: "Rec'd by mail July 6, '95. J. A. Montgomery"; that he received it from what is known as the round table, the place at which the mail comes into the office from the platform, where it is received from the publication office. (Rec., pp. 54, 55.)

Attention is called to the fact that this paper corresponds to the one described in the sixth count, and to the one which McAfee received at St. Louis. This came to him in the regular channels of the mails, in the same manner that all other papers of this kind are delivered. (Rec., p. 54.)

He received similarly copies of September 14 and July 27, 1895.

He received these papers at his desk *in the post-office*. He remembered that an employee from the round table brought him the copy of July 6. (Rec., p. 59.)

He testified as follows:

> I received the paper which purports to be the Chicago Dispatch for July 6, 1895 (and which is marked Government Exhibit 6), between 5 and 6 o'clock on the evening of July 6, 1895. I received that paper (referring to the paper purporting to be a copy of the Chicago Dispatch for July 6, 1895, and marked Government Exhibit 6) at my desk in the post-office. My desk is in room No. 1, on the west side of the post-office building. The round table is not in my office. The round table is in a room which is nearly the center of the post-office building, at the south end. There are five partitions between my room wherein I received all the copies of the Chicago Dispatch that I did receive and about which I have given testimony and the room which contains the round table that I have already described in my testimony. All the copies of the Chicago Dispatch that I received I received in my room. I received it (referring to the paper purporting to be a copy of the Chicago Dispatch for July 6, 1895, and marked Government Exhibit 6) from one of the employees at the round table or the messenger at my office. I know that I received that paper from one of the employees at the round table or the messenger of my office, because I saw him bring the paper. He got that paper, presumably, at the round table. I know that. I know he could not get it at any other place. I did not see him get it there. He did not need to tell me that he got it

there. I received that paper in my office in the post-office building, and my office is separate from the room which contains the round table by five doors. I swear positively that this paper (referring to Government Exhibit 6) came from that round table. I know that, because it is usual—the custom and the habit.

What I mean is this: That I received that paper (referring to Government Exhibit 6) from an employee of the post-office, and in accordance with the usual custom in the post-office said paper would have to come from that round-table. I don't know that I saw it on the round-table. I remember receiving the identical paper marked "Government Exhibit 6" because I have written on that paper this: "Received by mail July 6th, 1895. J. A. Montgomery."

I wrote that at the time I received the paper or within a few minutes afterwards. I don't know the name of the person that delivered it to me. All the other papers which I have identified and respecting which I have given testimony, (namely, the papers marked, respectively, Government Exhibit 6, Government Exhibit 7, and Government Exhibit 8) I received in the same way I have testified that I received the paper marked Government Exhibit 6. That paper (referring to the paper marked Government Exhibit —) I took from Captain Beattie's table between 5 and 6 o'clock on July 27, 1895. Captain Beattie's room is the second room from mine to the north. Captain Beattie received this paper in the same manner in which I received mine. I know that, because all of the papers must come from that source—that is, it is the custom to do that. Of my own knowledge, I don't know where Captain Beattie received this paper (referring to Government Exhibit —). I am positive that I received the papers that I have identified from the

round table, by reason of the system which prevails, which makes it impossible for the papers to come to me through other sources. (Rec., pp. 58, 59.)

The twenty-sixth count refers to the copy of September 14, and the twelfth count to that of July 27. (Rec., pp. 12, 6.)

Attention is called to the fact that the testimony of McAfee and the proof as to the duty of the St. Louis messenger have no reference to these papers and these counts.

These papers, referred to by Montgomery, except a substituted one for July 27, were labeled with his name. (Rec., p. 55.)

He testified that the Dispatch had been passing regularly through the mails for six months preceding July, 1895. (Rec., pp. 56, 57.) He testified as to the manner of receiving the mails at the Chicago post-office as follows:

> The mails are received from all the afternoon publications at the Jackson street front of the Chicago post-office. They are, as a rule, received by a man by the name of Morse. That is where the majority of the second-class mail is received. After the mail is received there it is weighed, taken to what we term the round-table—a large, round table—around which round-table hangs pouches and sacks. There the sacks are opened which contain the papers, and the papers are distributed from that table into the pouches and sacks. Then the pouches are sealed up and sent out on the various trains to whatever destination the publisher has indicated. The mail is weighed after it leaves the platform on which it is received and before it is carried to the round-table. During the past two years second-class mail has not been received in the Chicago post-office in any other

way. That has been our unvarying custom for the last three years. (Rec., p. 57.)

Morse, mail receiving clerk, testified that on July 6, July 27, September 14, and October 19, 1895, in the course of his official duties, he made memoranda (copies of which were put in evidence) showing that on each of those days many pounds of the Dispatch were mailed at the Chicago office. (Rec., pp. 61–65.)

He said they were unloaded at the office from a wagon marked "Chicago Dispatch," and that the words "Chicago Dispatch" were on the bags. (Rec., p. 62.)

Burke gave similar testimony in regard to mailing on August 10. (Rec., p. 65.)

Henry, the record clerk in the Chicago post-office, proved memoranda made by him in the line of his duty July 6, September 14, and October 19, showing the amount mailed by the Chicago Dispatch on those days. (Rec., pp. 66–69.)

Ohlander testified that he was distributor at the Chicago post-office, received the mail at the round table, was on duty from July 1 to October 31, 1895, and that on each of those days the Chicago Dispatch was mailed. (Rec., pp. 69, 70.)

All of the exhibits were put in evidence and read to the jury. (Rec., p. 78.)

None of the foregoing evidence was disputed. Defendant introduced no proof.

The defendant was found guilty (Rec., p. 23) and sentenced to imprisonment at hard labor in the penitentiary for two years and to pay a fine of $2,000 and costs. (Rec., p. 33.)

Assignments 11, 12, 34, and 61 are not insisted on in the briefs for plaintiff in error, and therefore are not treated of in this brief.

There is no assignment 33.

I.

The first assignment of error, presented on pages 34 and 85 of the brief for plaintiff in error, is as follows:

> That the said district court erred in overruling the motion of this defendant, made prior to the trial, to require the district attorney to file in said court the printed matter alleged in all and several the counts of the indictment to be obscene, lewd, lascivious, and indecent, for the purpose of enabling the defendant to demur prior to the trial to said indictment and each count thereof. (Rec., p. 93.)

It appears from this assignment that the ground of the motion was that the defendant might "*demur prior to the trial to said indictment and each count thereof.*"

The motion will be found at page 19 of the record, and was as follows:

> Your petitioner also craves over of all and several the said matters alleged in all and several the said thirty-two counts of said indictment to be obscene, lewd, lascivious, and indecent within forty-eight hours from the time that said over is granted by this court.

It did not appear from the motion that over was craved in order that defendant might demur; therefore the court should not be put in error for such reason. Besides, if there were any error, defendant was not injured thereby, for he had the benefit on the trial, by

exceptions to the evidence and to the charge, of every point that could have been raised upon demurrer.

It was held in *Rosen* v. *United States* (161 U. S., 29) that the indictment was not defective by reason of the fact that the obscene matter complained of was not set out in the indictment, and that it was sufficient if the papers containing the objectionable matter were referred to.

The indictment in this case referred to the name and dates of the papers, and averred that the obscene matter was so indecent that the same would be offensive to the court and improper to be placed upon its records.

The defendant was not in ignorance of the contents of the papers, and therefore suffered no injury in this respect, for his affidavit (set out on pages 17 to 19 of the record), upon which his motion is based, shows upon its face that he knew the contents of the papers. It contains a statement of the number of advertisements under the headings "personal" and "baths" contained in the papers referred to in the indictment, but avers that none of them are "obscene, lewd, lascivious, or indecent within the meaning of the laws of the United States," and that "they are not such matters as are forbidden by law to be transmitted through the United States mails."

II, III, IV, V, VI, VII.

The second assignment of error, treated of on pages 22 and 52 of the brief and p. 2 of the additional brief, for plaintiff in error, is as follows:

> That the said district court erred in admitting in evidence the portion of a certain newspaper pur-

porting to be a copy of the Chicago Dispatch for December 3, 1894, which said portion of said newspaper is marked "Government Exhibit 1," and is as follows:

GOVERNMENT EXHIBIT 1.

THE DISPATCH.

By Joseph R. Dunlop.

An independent afternoon daily paper.

Three editions daily—12, 3, and 5 o'clock.

Official paper of the city of Chicago and official paper of Cook County.

Dispatch Building, 115–117 Fifth avenue.

Telephones:

Business offices	3495
Editorial department	3494

Terms of subscriptions:

By mail, postage paid, one year	$3.50
By mail, postage paid, six months	2.00
By mail, postage paid, three months	1.25

(Mail subscriptions strictly in advance.)

THE DISPATCH,
115–117 Fifth avenue, Chicago, Ill.

New York office, 86 World Building, Max H. Fischer, manager.

Monday, December 3, 1894.

Eight pages.

[For an exact reproduction of the original, see Rec., p. 94.]

Objected to on the ground that said portion of said newspaper does not tend to show who was the publisher of said paper on December 3, 1894, and, secondly, that there is no proof that the paper of which said "Government Exhibit 1" is a portion is a copy of the Chicago Dispatch of December 3, 1894.

Objection overruled by court. Exception by defendant. (Rec., p. 94.)

Assignments III to VII, inclusive, treated of together with assignment 2 in the brief for plaintiff in error, are substantially like the second.

It is stated in the brief for plaintiff in error (pp. 22, 52) that the objection went only to the admission in evidence

of the two lines "The Dispatch, by Joseph R. Dunlop." This is an error. The exception as shown above went to the entire "portion of said newspaper," which was offered in evidence.

It was proper for these papers to go to the jury as a part of the evidence. They were not of themselves conclusive, nor is there anything in the charge of the court which conveyed any such impression to the jury. They constituted a link in the chain of evidence subsequently presented, and the order of introducing the proof was a matter within the discretion of the trial judge. (*Wood* v. *United States*, 16 Peters, 342, 361.)

It was shown by other evidence that Dunlop had stated that he was the proprietor and publisher of this paper (Rec., pp. 55, 56, 70, 71); that a paper of this name had been for a long time published and circulated by him (Rec., p. 56); that it had for a long time and in large numbers passed through the post-office (Rec., pp. 54, 69); that he had negotiated for the renting of a building for the purpose of publishing a paper called the Dispatch (Rec., p. 60); that he had conversations with witnesses in regard to the publication of a paper of that name (Rec., pp. 56, 70, 71); that he, as proprietor, had caused papers similar to these to be sent through the post-office, and that the accounts for postage had been rendered to him (Rec., p. 56).

It will also be observed that the type of the paper dated December 3, 1894, exhibited in the record, page 94, is identical with that of the type used in the other exhibits referred to in these assignments.

VIII, XIII.

The eighth assignment of error, treated of on pages 23 and 35 of the brief and page 1 of the additional brief for plaintiff in error, is as follows:

> That the said district court erred in permitting the witness Robert McAfee to make answer to all and several the questions following, to wit:
>
> "What was this messenger who delivered these papers?
>
> "(Objected to by defendant's counsel on the ground that the testimony already shows that the witness does not know who put the newspapers in his box, except from hearsay and rumor.)
>
> "The COURT. Question. He was a messenger to your office for the purpose of bringing papers from the post-office to your office?
>
> "Answer. For gathering mail for the inspectors and distributing it in a box provided in the post-office.
>
> "Mr. JOHN C. BLACK. I propose to prove that this was the universal custom and the duty of this messenger.
>
> "Mr. FORREST. I object. The witness was not there and does not know who put those papers in that box.
>
> "The COURT. I will permit you to show what the duty of the messenger was.
>
> "(To which ruling the defendant's counsel excepted.)
>
> "The COURT. What were the duties of this man whom you call a messenger?
>
> "Answer. His title is really chief clerk.
>
> "Question. Chief clerk of the inspector's office?
>
> "Answer. Of the inspector's office; and then another clerk whose business it is to go to the box

department and gather all the mails for the inspectors and bring it to the inspector's office and distribute it there, as the box clerks do down below.

"Question. He don't carry mail for the public at all?

"Answer. No, sir.

"Question. He only carries mail for the accommodation of the inspectors and officers of the post-office?

"Answer. It is his duty as an officer to bring the mail up into the office and put it into the box provided by the Government for each inspector's mail.

"Mr. FORREST. I move to exclude from the record and the consideration of the jury what the witness McAfee has just testified to with reference to the duty of the man that he supposed put those newspapers in the box in the post-office, inspector's office (referring to 'Government Exhibit 2,' 'Government Exhibit 3,' 'Government Exhibit 4,' 'Government Exhibit 5'), on the ground that the witness McAfee has repeatedly stated that he did not see the man put those papers in that box; so that we are following a presumption upon a presumption. It looks to me like an inference from an inference.

"(Motion to exclude overruled by the court; to which ruling defendant's counsel excepted.)

"Mr. BLACK. How long has this duty been so performed and how frequently by this messenger?

"(Objected to. Objection overruled by the court. Exception by defendant's counsel.)

"Answer. It has been the duty of the men occupying these positions ever since the office has been established. I don't remember when the office was established, but it has been eight or ten years, I think. These duties were performed by that messenger several times every day." (Rec., pp. 99–101.)

The thirteenth assignment of error, treated of on pages 24 and 35 of the brief for plaintiff in error, is as follows:

> That the said district court erred in permitting the said witness, John A. Montgomery, to make answer to the question following, to wit:
>
> "What are the duties of that messenger?
>
> "(Objected to. Objection overruled. Exception by defendant's counsel.)
>
> "Answer. In a general way his duty is to do anything we tell him to do, and he has certain fixed things to do that he does every day.
>
> "Question. Including this?
>
> "Answer. Yes, sir." (Rec., p. 102.)

These two assignments involve substantially the same question, and that is whether or not it was competent to prove the customs of the post-office and the duties of those charged with delivering mail to Government officials.

The witness McAfee testified that he found the papers in question in his box within the post-office *building*. Montgomery received his papers at his desk in the Post-Office *Department*. It certainly was competent to show that there was a duty imposed upon particular employees of the Government to deliver mail addressed to these officers, and which had reached the post-office in regular course of transmission. The same presumption should exist in such cases as would exist in the case of a deposit of mail in the box of someone whose place of business was outside of the post-office. The mail of McAfee was none the less in charge of Government officials, because it was to be delivered at his place for receiving mail within the post-office building, though not in that part devoted to the postal business. It was for the jury to determine

how far this proof tended to establish the averments of the indictment.

Large latitude is left to the trial judge in the admission of circumstantial evidence. (*Alexander* v. *United States*, 138 U. S., 353; *Holmes* v. *Goldsmith*, 147 U. S., 150; *Moore* v. *United States*, 150 U. S., 57; *Thiede* v. *Utah Territory*, 159 U. S., 510.)

It is objected on page 2 of the additional brief that it was error to admit this testimony, because it was an attempt to convict a person for acts different and apart from those charged.

This statement is founded on a total misapprehension of the papers referred to and of the grounds of the exception, under the eighth assignment. The papers of July 6, July 27, August 10, September 14, and October 19, 1895, were the very ones on the mailing of which five of the counts of the indictment proceeded upon were based. The exception as shown above related to these particular papers. The ground was, not that the evidence related to offenses other than those charged in the indictment, but that it was not competent to make out the charge in the indictment in respect of mailing these papers by evidence of the "duty of the man" who was supposed to have deposited them in the inspector's box.

IX, X, XIV.

The ninth assignment of error, treated of on pages 24 and 40 of the brief, and page 2 of the additional brief for plaintiff in error, is as follows:

> That the said district court erred in refusing to exclude the following sentence from the testimony

given by the witness John A. Montgomery, to wit:

"I am familiar with the fact that there is such a publication passing through the Chicago post-office as the Chicago Dispatch.

"(Exception by the defendant's counsel to the refusal of the court to exclude said sentence from the consideration of the jury.)" (Rec., p. 101.)

The tenth assignment of error, treated of together with assignment 9 in the brief for the plaintiff in error, is as follows:

That said district court erred in permitting the witness John A. Montgomery to make answer to all and several the questions following, to wit:

"Question. How long has that publication [referring to the Chicago Dispatch] been passing through the post-office?

"(Objected to. Objection overruled. Exception by defendant's counsel.)

"Answer. Well, I can't answer that question accurately, but I should say during the past three or four years.

"Question. Was the publication called the Chicago Dispatch passing regularly through the mails for the six months preceding the months of July, August, September, or October of last year?

"(Objected to. Objection overruled. Exception by defendant's counsel.)

"Answer. Yes, sir; regularly. A paper that does not go regularly is suspended at once.

"Question. Have you received the Chicago Dispatch during all that time?

"(Objected to. Objection overruled. Exception by defendant's counsel.)

"Answer. Yes, sir." (Rec., p. 101.)

The fourteenth assignment of error, treated of on pages 25, 40, and 52 of the brief for plaintiff in error, is as follows:

> The said district court erred in refusing to exclude from the testimony given by the witness John A. Montgomery the following, to wit:
>
> "I received all of the morning and evening papers in this way regularly sent to me, with my name on them.
>
> "(Motion to exclude the foregoing. Motion overruled. Exception by defendant's counsel.)" (Rec., p. 102.)

These four assignments involve substantially the same question.

It was competent for the witness to state that he was familiar with the fact that such a publication as the Chicago Dispatch passed through the Chicago post-office. There is no ground stated to sustain the objection. If the objection be that it did not appear that the witness had sufficient knowledge, or opportunities for knowledge, upon which to make his statement, this would be insufficient to exclude the testimony. That would have been a proper matter for cross-examination, leaving the jury to determine whether or not the witness had spoken recklessly or falsely.

One of the questions involved was whether or not the defendant had mailed, or caused to be mailed, the papers referred to in the indictment, and whether or not he had any connection with the publication known as the Chicago Dispatch. There was evidence going to show his connection with this publication for a long period prior to

the mailing of the identical papers referred to in the indictment.

Proof that such a publication had been going through the post-office was therefore relevant, taken with the other facts proven, viz: That the defendant had, in conversation with witnesses, referred to himself in connection with this paper, and that memorandum weight receipts had been kept in order to ascertain the amount of postage to be paid. It was also competent to show the continuous mailing of issues of the paper as an evidentiary fact bearing upon the question whether or not the particular papers in question had been mailed.

State v. *Elliott*, 45 Kans., 525, 527.
McKinney v. *Dingley*, 4 Greenl. (Me.), 172.
Cary v. *Hertinling*, 1 Hill (N. Y.), 34.
Lynn v. *State*, (Tex. Cr. R.), 22 S. W., 878.
Dawson v. *State*, 32 Tex. Cr. R., 535, 552.
Proper v. *State*, 85 Wisc., 615, 628.
Wood v. *United States*, 16 Peters, 342, 360.
Taylor v. *United States*, 3 Howard, 197, 208.
Castle v. *Bullard*, 23 Howard, 172, 186.
Lincoln v. *Claflin*, 7 Wallace, 132, 138.
Butler v. *Watkins*, 13 Wallace, 456, 464.
N. Y. Mut. Life Ins. Co. v. *Armstrong*, 117 U. S., 591, 598.

XV.

The fifteenth assignment of error, treated of on pages 25 and 40 of the brief for plaintiff in error, is as follows:

> The said district court errred in permitting the witness Francis A. Morse to make answer to the question following, to wit:
>
> "Question. Have you any independent knowledge that the Dispatch was delivered to you during that

period [referring to the period embraced by the months of July, August, September, and October, 1895]?

"(Objected to. Objection overruled. Exception by defendant's counsel.)

"Answer. Well, I know by the wagon that drove up, the cart marked 'Chicago Dispatch' on it, and unloaded there. If it happened to be unloaded when I was not there, I would examine the bags and see 'Chicago Dispatch,' so as to charge it to the right parties." (Rec., p. 102.)

The objection here was to the question. No exception whatever was taken to the answer, and no motion was made to exclude it.

The question was whether the witness had any independent knowledge that the Dispatch was delivered to him during the months of July, August, September, and October, 1895. These were the months in which it was averred that the papers described in the indictment were mailed. It was a proper circumstance to go to the jury that during these months this paper had passed through the post-office, and the testimony sought to be elicited by the question was relevant to the issue and competent.

XVI TO XXIII, INCLUSIVE.

The sixteenth assignment of error, treated of on pages 25 and 40 of the brief for plaintiff in error, is as follows:

> That the said district court erred in admitting in evidence a memorandum marked "Government Exhibit 9," which said memorandum is as follows:

GOVERNMENT EXHIBIT 9.

Post-office, Chicago, Ill.

Memorandum of second-class mail weighed on platform, July 6, 1895.

Name of publication or firm.	No. of sacks.	Gross weight.	Tare.	Net weight.
Arbeiter Zeitung, 2.18	1	37		
Abendpost, 3.00	1	20		
Drovers' Journal, 4.20	50	984		
Daily News, 2.35	1	8		
Daily News, 3.30	2	83		
Dispatch, 3.55	2	132		
Evening Journal, 2.12	1	6		
Evening Journal, 3.35	2	128		
Evening Post, 3.20	1	24		
Evening Post, 4.10	4	148		
Der Republikaner, 2.10	0	6		
Freie Presse, 3.00	1	16		
Mail, 2.45	0	4		
Furniture Bulletin, 1.55	0	6		
Western News, 3.35	0	3		
E. S. Zeitung, 3.55	2	110		
Total				

F. A. MORSE, *Weigher.*

(Objection to the admission of Government Exhibit 9 in evidence. Objection overruled. Exception by defendant's counsel. (Rec., pp. 102, 103.)

Assignments 17 to 23, inclusive, treated of together with assignment 16 in the brief for plaintiff in error, are substantially the same as assignment 16.

No ground for sustaining any of these objections was stated to the trial judge. (Rec., pp. 62–66.)

These memoranda were made by Government employees, as a part of their duty, on the day the transactions occurred, and are official records. They were made on the identical days the papers in question were averred to have been mailed, and show that on those days papers of the same name as those referred to in the indictment were received at the post-office as mail matter. (Rec., p. 61.)

Being official records, they were competent evidence. (*Owings* v. *Speed*, 5 Wheat., 423–4; *Hedrick* v. *Hughes*, 15 Wall., 127; *Evanston* v. *Gunn*, 99 U. S., 660.)

XXIV.

The twenty-fourth assignment of error, treated of on pages 25 and 40 of the brief for plaintiff in error, is as follows:

> That the said district court erred in permitting the witness T. Ohlander to make answers to all and several the following questions, to wit:
>
> "Question. State whether or not on each and all of those days [referring to all the days from July 1 to October 31, 1895] you received the paper called the Chicago Dispatch at the post-office.
>
> "(Objected to. Objection overruled. Exception by defendant's counsel.)
>
> "Answer. We did receive it—that is, we did receive it so far as I know. I put the answer that way for the reason that I should be notified if I had not received it.
>
> "Question. Do you now remember of having received the Dispatch at that place every day during

that period (referring to the period embraced in the last question)?

"(Objected to. Objection overruled. Exception by defendant's counsel.)

"Answer. Yes; I may say I do." (Rec., p. 110.)

Both objections in this assignment were to the question. No objection was made to the answers and no motion was made to exclude them. The questions bear directly upon the issue, and that is, whether or not the papers known as the Chicago Dispatch were mailed at the post-office on every day from July 1 to October 31, inclusive. This period covered all of the days upon which the papers specially referred to in the indictment were said to have been mailed.

The witness could have been cross-examined to test the value of his testimony. The facts called for by the question and given in the answer were relevant and competent, however inconclusive the answer may appear. This was a matter to be weighed by the jury.

The brief (p. 41) raises for the first time the point that the counts related to the 5 o'clock edition, while these exhibits do not necessarily refer to that edition.

If this objection had been stated when the evidence was offered the proof might have been made more specific. Such a point can not now receive any consideration. (*District of Columbia* v. *Woodbury*, 136 U. S., 450, 462; *Boston and Albany R. R. Co.* v. *O'Reilly*, 158 U. S., 334.)

XXV TO XXXI, INCLUSIVE.

The twenty-fifth assignment of error, treated of on pages 25 and 43 of the brief for plaintiff in error, is as follows:

> That the said district court erred in admitting in evidence the paper marked "Government Exhibit 2," which said paper contains the columns headed "Personal" and "Baths" of a certain newspaper that purported to be the Chicago Dispatch of July 6, 1895, and is as follows:
>
> (Here follows "Government Exhibit 2," marked p. 204, which will be found between pages 110 and 111 of the record.)
>
> Said paper was objected to on the following grounds:
>
> First. That the evidence failed to show that it was deposited in the Chicago post-office for mailing.
>
> Second. That the evidence failed to show that it was caused to be deposited in the Chicago post-office for mailing by the defendant.
>
> Third. That the evidence failed to show that it is a copy of the Chicago Dispatch.
>
> Fourth. The evidence failed to show that it is a copy of the paper described in any one of the counts of the indictment as the "Chicago Dispatch."
>
> Fifth. That it is not the paper described in any count of the indictment, because it does not, under the headings "Personal" and "Baths," contain matter that is too long or too obscene to be set out in the indictment or spread upon the records of the court.
>
> Sixth. That there is a variance between said "Government Exhibit 2" and the sixth count of the indictment.

Seventh. That said "Government Exhibit 2" does not tend to support the allegation in the sixth count of the indictment, because what is published therein under the headings "Personal" and "Baths" is not too long or too obscene to be set out in the indictment or spread upon the records of the court.

Said objection overruled by the court. Exception by defendant's counsel. (Rec., p. 111.)

This is the paper referred to in the sixth count of the indictment (Rec., p. 4), which is one of the counts elected to be prosecuted. (Rec., p. 20.)

Assignments XXV to XXXI, inclusive, treated of together on pages 25 and 43 of the brief and page 2 of the additional brief for plaintiff in error, are substantially the same.

The objections to the admissibility of the papers in evidence are not sound. The first four grounds assigned involved questions of fact. There was evidence tending to sustain the Government's position, and the jury were charged with the determination of those questions. The facts are argued at great length in the brief for plaintiff in error (pp. 43–50). The other three grounds involve questions of practice, to be determined by the sound discretion of the court. They all involve the question whether or not the objectionable matter was too long or too obscene to be set out in the indictment. If it was too obscene, the question of length made no difference. The trial judge was warranted in holding that it was not proper to be set out in the indictment. (*Rosen* v. *United States*, 161 U. S., 29.)

(For objectionable matter, see exhibits in record between pages 110–115.)

XXXII AND LX.

The thirty-second and sixtieth assignments are the same. (Rec., pp. 115, 122.)

The thirty-second assignment of error, treated of on pages 26 and 53 of the brief for plaintiff in error, is as follows:

> That the said district court erred in overruling a motion, made by defendant's counsel after the evidence was closed, to instruct the jury to return a verdict of not guilty. Said motion was urged on the following grounds:
>
> First. There is no evidence in the record tending to show that the defendant caused to be deposited in the Chicago post-office, for mailing, any one of the newspapers admitted in evidence that purports to be a portion of a copy of the Chicago Dispatch.
>
> Second. That the evidence fails to show that all and several the newspapers admitted in evidence which purport to be portions of copies of the Chicago Dispatch are copies of the Chicago Dispatch.
>
> Third. That the evidence fails to show that any one of the newspapers admitted in evidence and which purports to be a portion of a copy of the Chicago Dispatch contained any matter in print that is obscene, lewd, lascivious, or indecent.
>
> Fourth. That the evidence fails to show that the defendant knew that any of the documents admitted in evidence as papers which purport to be portions of copies of the Chicago Dispatch contained any matter that was obscene, lewd, lascivious, or indecent.
>
> Said motion was overruled by the court. Exception by defendant's counsel. (Rec., p. 115.)

The sixtieth assignment of error is as follows:

> That said district court erred in refusing, at the close of the evidence in overruling a motion made by the defendant's counsel, to direct the jury to find a verdict of not guilty. (Rec., p. 122.)

In a civil case the trial judge may direct a verdict for either party where the evidence is such as to make it proper to set aside a verdict in favor of the other. (*Randall* v. *B. & O. R. R. Co.*, 109 U. S., 478; *Bunt* v. *Sierra Butte G. M. Co.*, 138 U. S., 483.)

A verdict can only be directed when no recovery could be had by the party against whom the verdict is given upon any view which could properly be taken of the facts. (*Washington Tr. R. R. Co.* v. *McDade*, 135 U. S., 554, 571; *Dunlop* v. *N. E. R. R. Co.*, 130 U. S., 649; *Kaw* v. *N. C. Ry. Co.*, 128 U. S., 91; *L. & N. R. R. Co.* v. *Woodson*, 134 U. S., 614, 621.)

In a criminal case the rule is the same. If there be any substantial evidence tending to establish the crime charged the judge should submit it to the jury. If he would not grant a new trial on the ground that there is no evidence to sustain the verdict, then there is sufficient evidence to justify his letting the case go to the jury.

Where there is any evidence proper to go to the jury in support of the verdict, this court will not look to the question of its sufficiency. (*Crumpton* v. *United States*, 138 U. S., 361.)

There was evidence tending to sustain every essential part of the indictment. The jury has said, under oath, that they believed, beyond a reasonable doubt, that defendant mailed, or caused to be mailed, the papers in

question; that their contents were proven; that they were obscene, lewd, lascivious and indecent, and that this was known to Dunlop; and the trial judge has approved their finding.

XXXV AND XXXVI.

These two assignments are exactly the same.

The thirty-fifth assignment of error, treated of on pages 33 and 83 of the brief, and page 6 of the additional brief, for plaintiff in error, is as follows:

> That the said district court erred in permitting the said United States district attorney, who tried the case on behalf of the Government, to use in his argument to the jury, made after the evidence was closed, the following language, to wit:
>
> "UNITED STATES DISTRICT ATTORNEY. I do not believe that there are twelve men that could be gathered by the venire of this court within the confines of the State of Illinois, except where they were bought and perjured in advance, whose verdict I would not be willing to take upon the question of the indecency, lewdness, lasciviousness, licentiousness, and wrong of those publications."
>
> To which language counsel for defendant then and there duly excepted.
>
> Thereupon counsel for defendant called the ——— of the court to said language used by the district attorney, and thereupon the court said:
>
> "Let your exception be noted. I hardly think that last remark was proper. That is not an appeal to the evidence. It is an appeal to something outside of the evidence. Of course, there is nothing I can do with it except to say that it is improper, and I hope it won't be repeated."

"General BLACK. I withdraw the language." (Rec., pp. 115, 116.)

The thirty-sixth assignment of error is as follows:

> That serious error, highly prejudicial to the defendant, was committed in this, that in his argument to the jury, after the evidence was closed, the United States district attorney, who conducted the cause on behalf of the Government, spoke to the jury as follows:
>
> "I do not believe that there are twelve men who could be gathered by the venire of this court within the confines of the State of Illinois, except where they were bought and perjured in advance, whose verdict I would not be willing to take upon the question of the indecency, the lewdness, lasciviousness, licentiousness, and wrong of those publications."
>
> Said remarks were then and there promptly called to the attention of the court and duly excepted to by counsel for defendant. (Rec., p. 116.)

The language was used but once, although there are two assignments based on it. (Rec., p. 79.) The court, when appealed to, said the remark was improper, and counsel at once withdrew it.

What more could the court have done, and what more could counsel have done? Certainly the jury were fully informed that they were not to regard what was said.

XXXVII AND XXXVIII.

These two assignments are the same.

The thirty-seventh assignment of error, treated of on pages 33 and 83 of the brief, and page 6 of the additional brief, for plaintiff in error, is as follows:

> That the said district court erred in permitting the United States district attorney, in his argument

to the jury after the evidence was closed, to say: "Now, gentlemen, it is not necessary for me to tell you what the massage treatment is—how a man is stripped naked from the sole of his feet to the crown of his head and rubbed with the hands."

Exception to said language by counsel for defendant.

The court's attention was called to said language, and the court sanctioned the same by ruling that said language was properly used. (Rec., p. 116.)

The thirty-eighth assignment of error is as follows:

That the said district court erred in making the following ruling upon the following remarks of the United States district attorney in the argument of said United States district attorney to the jury:

"Now, gentlemen, it is not necessary for me to tell you what the massage treatment is—how a man is stripped naked from the sole of his feet to the crown of his head and rubbed with the hands."

"The COURT. Well, I suppose massage, like walking, is so well known that everybody knows what it is. I don't suppose there would be any harm in the district attorney stating what walking is."

"Certainly not," responded counsel for defendant.

And thereupon the court said:

"Then I do not think there is any impropriety in the district attorney stating what the massage treatment is." (Rec., pp. 116–117.)

The language of the district attorney, so far from being calculated to prejudice the defendant, put an interpretation upon the advertisements which was favorable to defendant. He would have been perfectly justifiable in arguing to the jury that some of the "massage" advertisements were on their face nothing but bold solici-

tations of prostitutes under a transparent guise. He, however, said that massage in these advertisements meant that "a man is stripped naked from the sole of his feet to the crown of his head and rubbed with the hands."

He of course spoke of the word "massage" as used in these papers. The advertisements themselves therefore are important to be considered in connection with his language.

The sixteenth count, which was one of those upon which defendant was tried (Rec., p. 8), refers to the advertisements under the heading "Baths," in the paper of August 10, 1895. This is Government Exhibit 4. (Rec., p. 74.)

Under the heading "Baths" is the following: "A genuine bath and massage given by a lady at her home, 233 West Madison street, first flat."

Similar advertisements appear, under the head of "Baths," in Government Exhibit 5 (Rec., p. 74), which is a copy of the paper of September 14, 1895, referred to in the twenty-sixth count. (Rec., pp. 12, 75.)

The thirty-second count (Rec., p. 14) refers to the paper of October 19, 1895, and to the advertisements under "Baths." This is in evidence. (Rec., p. 78.) The following appears in it:

> 1608 Wabash Av., 2d floor 1608, suite 3.—A refined young widow, living in her own home, will give baths and massage to refined gentlemen; Miss La Croix in attendance; pleased to see old friends; also new ones.

There are a number of similar ones in the same column. The jury might assume that this refined widow was not

going to bathe and massage these refined gentlemen away from their homes with their clothes on.

The district attorney did not go out of the record in his comment upon the operation except in the exculpatory statement that it was accomplished by rubbing the patient with the hands from the crown of his head to the soles of his feet.

In this he gave the accepted meaning of the word massage, which is, manipulating a part or the whole of the body by percussion. (See Webster, Worcester, Standard, and Century Dictionaries, "Massage.")

The additional brief (p. 9) says:

> Recent large and ponderous volumes of Webster, Worcester, and other lexicographies have not the word *massage*, as common as it is claimed to be and familiar in knowledge as walking.

Whoever searched in the recent editions of Webster and Worcester must have gotten hold of kindergarten copies or editions especially expurgated for use in boarding schools for girls.

If, however, it be said that the district attorney was stating a fact not in evidence, yet the charge of the court sufficiently advised the jury that they were to find all the facts for themselves, and not be influenced by what counsel might have suggested.

He said:

> You will not rely upon anything that counsel has said to you as to what the evidence is, unless your own recollection confirms that statement. You are the judges of what the evidence shows and you alone are responsible for that judgment. (Rec. pp. 81, 82.)

Unless the functions of the advocate are to be suspended he should not be hampered in argument by technical rules. Much latitude must necessarily be given, and even if he transcends legitimate bounds a reversal should not be had on that account, if the verdict is well supported *and it is not probable that the defendant has been prejudiced.* A mere possibility is not sufficient. This doctrine is sustained by the weight of authority.

In *Hatcher* v. *State* (18 Ga., 460, 464), the court held that the trial court was clearly right in not stopping the State's attorney, in his concluding argument, from what the defendant alleged to be a misrepresentation of the testimony. The testimony was conflicting. The court said that where the evidence was conflicting the prosecuting attorney might have been a little more accurate in what he claimed the proof to be, but an iron rule must not be prescribed upon this subject. It would trammel too much that freedom of discussion so necessary to the elucidation of truth.

In *Towner* v. *Thompson* (82 Ga., 740, 744), counsel for Thompson stated a fact not in evidence, to wit, that Towner was born in Illinois.

The court held that this statement was improper, and that the request made by opposing counsel to charge directly to that effect should have been granted; but that the charge given, to wit, that the jury should try the case by the evidence and not by what counsel said in their speeches, was sufficient.

In *State* v. *Beasley* (84 Iowa, 83, 87), counsel for the State expressed themselves as convinced beyond a reasonable doubt that defendant was guilty.

This was held not to be any reason why the judgment should be disturbed.

In *Jas. Wilson* v. *People* (94 Ill., 299, 327), the court said that the fact that the State's attorney was led into much intemperance of speech in his closing argument was not such an error as would authorize a reversal of a judgment clearly right under the evidence.

In *Garrity* v. *People* (107 Illinois, 162, 168), defendant objected that counsel for the people indulged in improper remarks in the presence of the jury which were not pertinent to the case and tended only to prejudice the jury against him. The court said that, conceding the conduct of counsel in the respect stated may be subject to criticism, yet it can not be regarded as of so gross a character as to require a reversal of the judgment.

In *Spahn* v. *People* (137 Ill., 538, 545), the remarks were that the defendants were robbers and burglars; "they have been in trouble before;" "we know this man Spahn is guilty, because he is indicted in another case in this court."

The court said in substance:

> The first of these remarks was not particularly exceptionable, because there was evidence tending to support it.
>
> The second remark is justly subject to criticism. It was improper and illegitimate for counsel to argue, or state to the jury, that guilt was established or known because defendant was under indictment in

> another case; but some reliance must be placed upon the common sense and discrimination of the jury, where counsel seek to draw improper inferences from evidence. While arguments of that character are not looked upon with favor, still they will not ordinarily be deemed sufficient to necessitate a reversal of the judgment, unless they are of such a character as to raise an inference that the jury were probably misled or improperly influenced thereby. The remarks in this case were not of that character.

In *Siebert* v. *People* (143 Ill., 571, 590), the attorney referred to the fact that two poisoning cases occurred in the city of Aurora within the last five years. The court said that as a general rule the argument should be confined to the evidence, but by way of illustration known facts may be referred to in argument, that the State's attorney might in argument insist that defendants thought they could get rid of the deceased by the use of poison, and cover up their crime and escape punishment as others had done, that unless it appear that defendants have been injured by the improper remarks, the judgment should not be reversed on that ground alone.

In *Bowes* v. *Galesburg* (28 Ill. App., 321, 324), the remarks complained of were that the appellant and the complaining witness had quarreled so much and created so much disturbance that the city authorities were obliged to interfere to stop it.

The court said that they did not desire to be understood as giving countenance in any degree to remarks or arguments of attorneys outside of the evidence, that it was quite reprehensible, that sometimes remarks will be made outside of the evidence, which are directly calculated to

be, and are, productive of vicious results and improper verdicts, but it does not follow that in every case of improper conduct or speech of attorneys to the jury the verdict should be set aside, that it is only in cases where harm results, and this must be determined by the facts and circumstances of each case.

In *Combs* v. *State* (75 Ind., 215), the prosecuting attorney was permitted to state that a witness employed or assisted in employing counsel.

The court held that it would not undertake to correct illogical inferences drawn from facts in evidence.

One of the attorneys for the State said that three or four men had recently been executed at Indianapolis, most of whom set up the plea of insanity. The court did not regard that statement as of sufficient materiality to warrant a reversal. It was said that courts ought not to reverse because counsel, in the heat of argument, sometimes make extravagant statements or wander a little way outside of the record.

In *Epps* v. *State* (102 Ind., 539, 550), defendant objected to one of the State's attorneys going beyond the limits of legitimate debate in some of his statements to the jury. The attorney was frequently interrupted by counsel for the defendant, and the court frequently admonished him to keep within the evidence.

The court held that, taken in connection with the interruptive denials and interjections of the defendant's counsel, and the prompt disapproval of the court, it would not feel justified in holding that the misconduct of the attorney for the State was so gross as to require a reversal of the judgment.

In *Shular* v. *State* (105 Ind., 289), the court held that the remarks of the prosecuting attorney upon a mere collateral matter did not work an injury to the substantial rights of the appellant, and that it is only in cases where there is a substantial injury to the appellant that the court can reverse.

In *Boyle* v. *State* (105 Ind., 469), the prosecuting attorney, referring to the defendant, asked the jury if they would believe a person who has told so many lies, and who has just seen the shadow of the gallows. The court said it was improper for the prosecuting attorney to have said that the accused had just seen the shadow of the gallows, but this was not sufficient to warrant a reversal, and that it is only where the misconduct in argument is of such a material character as makes it probable that it misled the jury, to the prejudice of the accused, that the court can reverse.

In *Heyl* v. *State* (109 Ind., 595), the prosecutor said, in his argument, that he had personal knowledge of the fact that the defendant was reputed to be a hotel thief, and that he had been published and portrayed in the Police Gazette as such.

The court said that the speech went entirely beyond the bounds of propriety, and could not be justified, that the remarks should have been withdrawn from the jury, but that the evidence in the record, however, fully sustained the verdict of the jury, and there was a shadow of an excuse for the remarks, and therefore the court declined to reverse.

In *State* v. *Duck* (35 La. An., 764, 765), the court held that there was no force in a complaint that the trial judge

refused to stop the district attorney in the course of his argument at the request of counsel for the accused, who charged that the attorney was making an improper and unfair argument.

The court said:

> This court can not, and will not, interfere with district judges in the manner of controlling their courts, or of enforcing rules of propriety and decorum on the officers of the court.

In *People* v. *Gosch* (82 Mich., 22, 28), the remarks complained of are as follows:

> For some time previous to the night of the killing there had been thefts committed in the neighborhood, thefts of wheat and other articles, from farms.
>
> There is nothing which so stirs up farmers as stealing wheat, wool, and horses; and these men who were there thrashing had heard about this alleged wheat stealing.

No statement was made connecting defendant with such thefts.

The court said that it was only in a very clear case of abuse by the prosecuting officer, and where the respondent's rights have been prejudiced thereby, that it would set aside a verdict otherwise manifestly proper; the facts of this case fully warranted the conviction that it would not disturb the judgment.

In *Cavanah* v. *State* (56 Miss., 299, 308), counsel for the State read as a part of his argument an essay of his own on dueling, and also extracts from Sabine on Duels and Duelling. This was objected to. The court declined to stop the argument. The essay contained a

vivid description of the results of different duels, and the fate of successful parties engaged therein, and also the ruin of the families of said parties. The extracts from Sabine on Duels and Duelling, after laying down the rule "amongst gentlemen" as to blows, insults, and apologies, gave accounts of the after life of one who had killed his adversary in a duel, which is represented to have been one of great unhappiness to himself and family. The court said that a large discretion in this matter must be exercised by the circuit judge; that it was a very delicate duty, for he must be cautious not unduly to abridge the liberty of counsel, and in restraining him within proper limits must not deny him the fullest liberty of discharging his important duties in enforcing his views of the law and the evidence, that:

> His illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit or wings to his imagination.

In *Lamar* v. *State* (65 Miss., 93), counsel was permitted to tell the jury that on a former trial the jury "were not out more than one minute in their deliberations, when they returned into court with a verdict of guilty." The attorney also persisted in reading to the jury as evidence against the accused certain portions of the written testimony of a witness which had not been put in evidence, although directed by the court twice to desist.

The court said that they would vacate a judgment of conviction, where the prosecuting attorney had resorted to the practices shown in the record in this case, if there

were the slightest doubt of the guilt of the accused, but where the guilt of the accused is clearly and uncontrovertibly shown a mere error in the proceedings will not call for a reversal.

In *Hemingway* v. *State* (68 Miss., 371, 421), the remarks were not set out. The court said that, while recognizing the privilege of counsel to exercise the largest liberty in argument, and while admitting pardonable liability of the earnest advocate to transgress the bounds of permitted license, still, in this case, or in any case, if it seemed probable, on a full survey of the whole case, that the unwarranted remarks of counsel had swerved the jury from the right line, or had contributed to secure a verdict not clearly responsive to the evidence and instructions of the court, "we should feel it our duty to reverse."

In *State* v. *Hamilton* (55 Mo., 520, 522), the abusive language made use of by the counsel was not preserved in the bill of exceptions. The court, however, said that it would not undertake to restrain the attorney in his choice of language in arguing a case before the jury, that epithets and invective, in which counsel sometimes indulge, are frequently matters of taste, and cases often occur in which severe animadversion is deserved and merited, that, after all, it is for the court in the presence of which the trial is had to determine whether counsel transcends the limits of professional duty and propriety, and that determination can not in an appellate tribunal be assigned as error.

In *State* v. *Griffin* (87 Mo., 608, 615), the court held that certain remarks made by the prosecuting attorney in

his closing argument for the State afforded no ground for a reversal of the judgment. They were as follows:

> The sheriff of Greene County, Mo., had often intrusted the deceased with the most important business, that he had a mother only 15 miles away, she is not here to share his troubles, and the question for you gentlemen of the jury to decide is whether law and order shall prevail in this community, or whether the defendant, this murderer, shall be punished.

The court said that it would have been in better taste not to have called the defendant a murderer, but that the judgment would not be reversed because the district attorney called the accused what the evidence for the State tended to prove him to be.

In *State* v. *Elvins* (101 Mo., 243, 246), the court held that it was directly within the line of legitimate argument to say to the jury: "You know that these assaults with intent to kill are becoming too common in this country and in southeast Missouri."

In *State* v. *Banks* (10 Mo. Ap., 111, 115), the prosecuting attorney said:

> Shall I tell you of the brutal treatment of the wife by the defendant? The abuse, the kicking, the beating, to force her from Captain Bartle's protection, and to drag her to pander to his lust, to gratify his passion? If these do not show a man depraved and fatally bent on mischief, I do not know what the term means," etc.

There was no evidence that the defendant kicked his wife, though there was evidence that she had stated that he had done so.

The court said that counsel should confine themselves to what has been testified to.

In this case there was no room for doubt that defendant killed his wife, and the court held that, whether the closing remarks of the prosecuting attorney exceeded the fair limits within which he should confine himself or not, they were certainly no ground for reversing the judgment.

In *State* v. *Underwood* (77 N. C., 502), counsel for the State said that defendant seemed to be popular with the ladies, as one had become his security, who might be a bouncing lass of 16 or a fancy character. On objection by defendant's counsel, the judge said that there was no evidence of this and "this case must be tried on the evidence."

The court said that they would always order a new trial when it seems probable that the defendant has been prejudiced on his trial by such abuses; but that the lower court in the present case ordered the remarks to cease before any real injury was done.

In *State* v. *Robertson* (26 S. C., 118), one of the grounds for asking a new trial was that the trial court allowed the State's attorney to go beyond the testimony, and urge upon the jury that the defendant, prior to the time of the alleged rape, had committed an assault and battery on a woman and was dodging around evading arrest at the time of the alleged rape.

The court said that it was most certainly proper, especially in criminal cases, that counsel, in addressing the jury, should keep themselves strictly within the record; that

this rule was essential and must be enforced; but that from the very nature of the case some latitude in argument must necessarily be allowed; that the matter of drawing the line between what is lawful and what is not lawful pertains to the conduct of the case, and must, to a large extent, be left to the wise discretion of the circuit judge.

In *Scott* v. *State* (7 Lea (Tenn.), 232, 235), the court held that the remarks of the attorney-general, that "if the juries do not punish crime the people will rise up, and should rise up and punish it," were very reprehensible, but would not justify granting a new trial.

In *Young* v. *State* (19 Tex. App., 536, 543) the county attorney said:

> I believe that George Young is guilty of this atrocious murder. I am not opposed to capital punishments, and believing him guilty, I would have the nerve to hang him.

These remarks were not considered to be reversible error, and the judgment was affirmed.

In *Kennedy* v. *State* (19 Tex. App., 618, 633) the court followed the case of *Young* v. *State* (*ante*), and held that the remarks of the assistant prosecuting attorney that he "undoubtedly believed defendant guilty" did not constitute a sufficient ground for reversal.

In *Walker* v. *State* (28 Tex. App., 503, 505), the court held that improper and uncalled for remarks of the district attorney which are not calculated to affect injuriously the rights of the defendant are not reversible error.

In *Habel* v. *State* (28 Tex. App., 588, 600), the county attorney said that it was his candid and honest belief

that the defendant was guilty of murder. The court in this case also followed the case of *Young* v. *State* (*ante*), and declined to reverse.

In *Watson* v. *State* (32 Tex. Crim. R., 80, 84), the question was whether the acids conveyed by defendant into the jail were useful to aid persons to escape therefrom. The district attorney suggested that it was a common practice to throw vitriol into the eyes of persons and blind them, showing how the acids may have been applied. The proof disclosed one way in which the acids could have been employed, and the district attorney simply suggested another.

The court held that his remarks were improper, but were no reason for reversing.

In *Henry* v. *State* (Texas) (30 S. W., 802, 803), the district attorney said that the defendant was guilty beyond a doubt and ought to be hanged, and that he could pull the rope.

The court held that these remarks were not sufficient to cause it to interfere and grant a new trial. The expression that he could pull the rope was not authorized by the testimony and ought to have been reproved.

The court said:

> Considering the evidence, however, in this case, we fail to see how the remark in question prejudiced the rights of the defendant before the jury, and it is not of that character to require a reversal of the case.

In *State* v. *Valwell* (66 Vt., 558), the court held that it was not error for the prosecuting attorney to say to the

jury that more scoundrels had been permitted to go at large under the doctrine of reasonable doubt than they were aware of.

The case of *State* v. *Shawn* (40 W. Va., 1, 5) contains a full discussion of this question.

Among other things, the prosecuting attorney said that if the prisoner be sentenced to life imprisonment he would be liberated in a few years, and, in this connection, called attention to the anarchists of Chicago and the action of the governor of Illinois, to which the prisoner, by his counsel, objected, and the court suggested that the attorney was perhaps going too far away for examples, but gave the jury no instructions in reference thereto. Proceeding, counsel said: "If you sentence him to the penitentiary for life, it would not be five years until he will be out on some excuse or pretext, and return home to enter upon a new course of crime." He further said: "This is the grand culmination of an epidemic of crimes that have been committed in this country." He further said, referring to the prisoner: "He is so steeped in crime that he has no friend to sit beside him during the trial."

The court quotes from *Shore's Case* (31 W. Va., 491), as follows:

> Counsel must necessarily be allowed considerable latitude in the argument of a case, and unless the court, in a felony trial, permits counsel for the State to so far transgress the rules of propriety as clearly to prejudice the prisoner, the judgment will not be reversed because of improper remarks by counsel to the jury.

(Shore's Case was reversed, but not on the ground of improper remarks by counsel. The assignment on this subject was considered by the court and overruled.)

The court goes on, in the Shawn Case, to state that the occurrences in great criminal trials are so many and diverse, the pressure, heat, and excitement of counsel in the struggle are often so intense, that it is well-nigh impossible for counsel to guard themselves so exactly and scrupulously as to avoid some remarks outside the boundary of exact propriety and that great latitude must be allowed to counsel in argument.

In *New York Biscuit Co.* v. *Rouss*, 74 F. R., 608, the court held that an exception by defendant's counsel in the presence of the jury to the language used by the prosecuting attorney, which was sufficient to challenge the attention of the jury to the difference of views held by the opposing counsel, was a sufficient corrective.

XXXIX.

The thirty-ninth assignment of error, treated of on pages 26 and 54 of the brief, and page 3 of the additional brief, for plaintiff in error, is as follows:

> That the said district court erred in using the following language in his charge to the jury, to wit: "The testimony of the Government tends to show that with respect to the papers sent to Mr. McAfee, he, under the name of Williams, wrote to the Dispatch in this city asking them to send him the paper for a specified time and inclosing the subscription price for that period; this letter was written from St. Louis; that after that time he continued to receive the Dispatch; it was brought to his office by his

messenger, supposedly from the post-office, though he himself personally does not know."

Exception by defendant's counsel to the use of the foregoing portion of the charge to the jury on the ground that there is no evidence that any one of said papers was brought to Mr. McAfee's office by the messenger. (Rec., p. 117.)

The sole ground of exception is that the court erred in saying to the jury that the testimony of the Government tended to show that the Dispatch was brought to the office of McAfee by his messenger, and for the alleged reason that there was no proof that any one of the said papers was brought to McAfee's office by the messenger.

McAfee testified that the paper was delivered to him regularly in his box in the St. Louis post-office building (Rec., p. 47); that his mail was put there by a messenger from the inspector's office in the post-office building; that he did not see the messenger put them in the box (Rec., p. 48); that this messenger was a letter carrier so far as his office was concerned; was charged with the duty of gathering mail for the inspectors and distributing it in a box provided in the post-office (Rec., p. 50); that it was his duty as an officer to bring the mail up into the office and put it into the box provided by the Government for each inspector's mail (Rec., p. 51); that this duty was performed by that messenger several times every day (Rec., p. 52); and that he had so gotten his mail for ten years (Rec., p. 52).

The court, while commenting on the evidence, said to the jury: "You are the judges of what the evidence shows, and you alone are responsible for that judgment." (Rec., p. 82.)

Again:

> Now, gentlemen, if you, under the instruction of the court, taking all the proven facts in the case under consideration and accepting as proven those which are beyond a reasonable doubt, come to the conclusion that the defendant knowingly caused to be deposited in the post-office these papers introduced in evidence, and if an inspection of these papers causes you to come to the conclusion that they contained obscene, lascivious, and indecent matter under the rules that I have given to you, it is your duty to return a verdict of guilty. (Rec., p. 87.)

Thus the court left the final determination of all of the facts to the jury.

The court may express its opinion upon the facts, provided no rule of law is incorrectly stated and all matters of fact are ultimately left to the jury.

United States v. *Philadelphia, &c.*, 123 U. S., 113, 114.
Williams v. *Conger*, 125 U. S., 397, 421.
Rucker v. *Wheeler*, 127 U. S., 85, 93.
Lovejoy v. *United States*, 128 U. S., 171, 173.
California Ins. Co. v. *Union Compress Co.*, 133 U. S., 387, 416.
Allis v. *United States*, 155 U. S., 117, 123.

XL.

The fortieth assignment of error, treated of on pages 27 and 55 of the brief, and page 3 of the additional brief for plaintiff in error, is as follows:

> That the said district court erred in using the following language in his charge to the jury, to wit: "Now the testimony of the Government also tends

to show that as a matter of fact the Dispatch during this period was delivered at the round table for mailing purposes; that it was delivered there in considerable quantities and its weights taken by the weigher of the Post-Office Department and reported to the clerk whose duty it was to record them."

Exception by defendant's counsel to the use of the foregoing portion of the charge, on the ground that the testimony referred to in said portion of the charge was improperly admitted. (Rec., p. 117.)

The only ground of exception is that the testimony referred to was improperly admitted. The assignment does not show that it was excepted to. If it were excepted to, then the question of error would arise upon the action of the court in admitting it, and not upon the charge. If, not being excepted to, it went to the jury and there was no request to withdraw it, it would not be error for the court to refer to it and state what it tended to show.

XLI, XLII, XLIV, AND XLVII.

The forty-first assignment of error, treated of on pages 27 and 56 of the brief, and page 4 of the additional brief, for plaintiff in error, is as follows:

That the said district court erred in using the following language in his charge to the jury, to wit: "So that you are at liberty to take all these facts together, consider them together, and if upon their consideration as a whole you have no reasonable doubt but what the Dispatch was deposited in the office, you are at liberty to find that it was so deposited, notwithstanding the fact that no witness saw it deposited."

Exception by defendant's counsel to the use of the foregoing portion of the charge on the ground that said language casts the burden of proof upon the defendant. (Rec., p. 117.)

The forty-second assignment of error, treated of on pages 27, 58, and 60 of the brief, and page 4 of the additional brief, for plaintiff in error, is as follows:

That the said district court erred in using the following language in his charge to the jury, to wit: "If, on the other hand, with all these facts in mind and giving to each its due credit in weighing the probabilities, if you can see some reasonable ground for believing of or doubting that these particular papers were deposited in the post-office, you must give to the defendant the benefit of that doubt. It is your duty to come to a conclusion upon all those facts and the effect of all those facts the same as you would conscientiously come to a conclusion upon any other set of facts that come before you in life."

Exception by defendant's counsel to the use of the foregoing language on the ground that said language casts upon the defendant the burden of proof and permits the jury to decide the issues without reference to the rules of law. (Rec., pp. 117, 118.)

The forty-fourth assignment of error, treated of on pages 28 and 58 of the brief, and page 4 of the additional brief, for plaintiff in error, is as follows:

That the said district court erred in using the following language in his charge to the jury, to wit: "If after having done that you have no reasonable doubt that these papers were deposited in the post-office, it is your duty to so find that fact. If you have, then, as I said before, give the defendant the benefit of the doubt."

> Exception by defendant's counsel to the use of the foregoing language on the ground that said language casts upon the defendant the burden of proof. (Rec., p. 118.)

The forty-seventh assignment of error, mentioned on page 29 of the brief for plaintiff in error, is as follows:

> That the said district court erred in using the following language in his charge to the jury, to wit: "Now, taking these facts altogether, is there any reasonable doubt in your mind that the Joseph R. Dunlop on trial before you is the publisher of this paper or is there any reasonable doubt in your mind that when these papers were deposited in the post-office, if they were so deposited, it was done with his assent or knowledge? If there is not, then it is your duty to find these facts in favor of the Government. If there is, you must give, as I said before, to the defendant the benefit of that doubt."
>
> Exception by defendant's counsel to the use of the foregoing language on the ground that said language casts upon the defendant the burden of proof. (Rec., p. 119.)

All of these assignments involve substantially the same questions.

The effect of the portions of the charge quoted was not to change the burden of proof. They simply told the jury that the facts necessary to make out the crime charged might be shown by circumstantial evidence.

There could be no such question involved as shifting the burden of proof. Defendant introduced no evidence. The court told the jury distinctly that there was a presumption of innocence and that the proof introduced

must convince them beyond a reasonable doubt of defendant's guilt. (See charge, Rec., pp. 85, 86.)

The criticism that in the part of the charge quoted under assignment 42 the court permitted the jury to decide without reference to the rules of law seems hardly worthy of comment. There is nothing in the passage which would even remotely justify such an inference.

It is urged on page 57 of the brief for plaintiff in error that, by the judge's use of the name Dispatch in that portion of the charge set out in the forty-first assignment, the jury were warranted in convicting if they found a mailing of that paper on any day other than those specified in the counts which were prosecuted. All of the evidence was to show the mailing on these particular days. It is crediting a jury with far less than average sense to make such a suggestion. This is clearly an afterthought now raised for the first time. The exception taken to the charge at the time and above set out hints at no such ground. Such a point can not now receive any consideration. (*District of Columbia* v. *Woodbury*, 136 U. S., 450, 462; *Boston and Albany R. R. Co.* v. *O'Reilly*, 158 U. S., 334.)

The criticism on pages 58–60 of the brief, that the portions of the charge set out in the forty-second and forty-fourth assignments are misleading, on the doctrine of reasonable doubt, treats those passages segregated from the remainder of the charge. The charge must be considered as a whole. The court instructed the jury as follows:

> Until the Government proves beyond a reasonable doubt that he knowingly caused to be deposited

such a publication in the mails, the presumption of innocence stands between any penalty that the court might inflict, or any verdict that you might pronounce, and the defendant. That presumption of innocence is only overcome when these facts that I have named as the gist of the offense are, in your judgments, established beyond a reasonable doubt.

* * * * *

With that definition of a reasonable doubt, it is your duty, then, to look into all the evidence that is offered, to ascertain if the charge has been made out beyond such a doubt. (Rec., p. 81.)

Again:

Does the evidence, then, establish beyond a reasonable doubt that the defendant deposited, or caused to be deposited in the post-office, a copy of these papers which are said to contain the offensive and indecent matter? (Rec., p. 82.)

Again:

No circumstance introduced in evidence on this trial can be used by you as a basis for any inference that any one or all of the newspapers addressed to Mr. Montgomery or Mr. Williams was deposited in the post-office at Chicago for mailing, unless such circumstance is first proven beyond a reasonable doubt.

And any circumstance in this case admitted in evidence for the purpose of showing that any one or all of said newspapers were deposited in the post-office at Chicago for mailing, which is not so proved beyond a reasonable doubt, should be wholly dismissed from your consideration, and must not be permitted to influence you to any extent against the defendant. (Rec., pp. 86, 87.)

It was in connection with these explicit instructions that the court charged as complained of, and the jury could not have failed to understand that it was necessary for the Government to establish by evidence the guilt of the defendant beyond a reasonable doubt.

XLIII.

The forty-third assignment of error, treated of on pages 28 and 60 of the brief for plaintiff in error, is as follows:

> That the said district court erred in using the following language in his charge to the jury, to wit: "There is no technical rule, there is no limitation in courts of justice that prevents you from applying to them" (the facts and circumstances in evidence) "just the same rules of good common sense, subject always, of course, to a conscientious exercise of that common sense, that you would apply to any other subject that came under your consideration and that demanded your judgment."
>
> Exception by defendant's counsel to the use of the foregoing language on the ground that the said language instructed the jury that the jury might depart from the well-known rules of law and base their verdict on the rules of good common sense. (Rec., p. 118.)

This was no more than telling the jury that, in passing upon the evidence which had been admitted by the court, they were to use the rules of common sense. There was no question of law involved to be settled by the jury. The court had assumed all responsibility for the law. There were no "well-known rules of law" that they would have to depart from to use their common sense in passing upon facts and drawing conclusions from them.

They had been fully instructed as to the burden of proof, the presumption of innocence, and reasonable doubt.

The brief fails to point out any well-known rule of law that would be disregarded if the jury followed the above instruction of the court as to using their common sense.

This charge is treated, judging from the authorities cited in the brief (pp. 61–65), as if the court intended to wipe out all of its instructions and to turn the jury loose to consider all the testimony and the law according to their ideas of common sense, and so determine the controversy. The court had acted upon the evidence, admitting what was proper to go to the jury, and instructed them particularly as to the purposes for which certain testimony might be considered. (Rec., p. 86.) He said that there was no technical rule of reasoning to be applied in getting at the truth from the evidence before them, and that in weighing the evidence and drawing conclusions from it they were to be guided by such common sense, i. e., sound judgment, as they would use in determining facts in respect of other weighty affairs.

In the Scales Case (brief 61) the charge was far different. The court left to the jury the application of "rules of evidence," and the Supreme Court, in reversing, laid particular stress upon these words.

In the case at bar the judge gave the jury no warrant to substitute their common sense for "rules of evidence" or "rules of law," but directed them to use it subordinated to the rules of law given by the court and applied to the evidence which the court had admitted.

XLV.

The forty-fifth assignment of error, mentioned on page 29 of the brief for plaiutiff in error, is as follows:

> That the said district court erred in using the following language in his charge to the jury, to wit: "That raises the question as to whether the defendant is the publisher of this paper or has such a connection with the paper that he must be held responsible as the publisher and deliverer of the paper. If the defendant holds such an office in the management of the Dispatch that whatever anybody else does with the Dispatch is under his guidance, with his assent, then he is responsible for that act just as much as if he had done it with his own hand. So you must ascertain from the evidence whether he is the publisher, and whether as such publisher he knew that the paper was going through the post-office."
>
> Exception by defendant's counsel to the use of the foregoing language on the ground that said language authorized the jury to conclude that the defendant delivered the newspapers in evidence to the mails, from the fact that the defendant was the publisher of the newspapers. (Rec., p. 118.)

It seems that the above criticism is based upon an entire misapprehension of the portion of the charge set out. It had no reference to the actual delivery or the testimony bearing on it. The delivery was shown by distinct proof. The charge referred alone to the criminal responsibility of a manager for delivery by his subordinates, where his office was such that those who made the actual delivery were under his guidance and acted with his assent.

If there had been no evidence of delivery the jury could not have been led to believe that there was a delivery by the mere proof of the fact that Dunlop was the publisher. The delivery being proven, the charge justified the jury in holding Dunlop responsible if the proof showed that he was the controlling head and that those who made the actual delivery were but his agents.

XLVI.

The forty-sixth assignment of error, treated of on page 68 of the brief for plaintiff in error, is as follows:

> That the said district court erred in using the following language in his charge to the jury, to wit: "The paper itself, introduced in evidence, contains on one of its pages the statement that it is published by Joseph R. Dunlop, and in response to an inquiry by the court of one of the witnesses it was stated that it was not known that there was any other Joseph R. Dunlop in the newspaper business in the city of Chicago."
>
> Exception by defendant's counsel to the use of the foregoing language on the ground that said language authorized the jury to find that defendant was the publisher from evidence improperly admitted, namely, the statement at the head of the editorial column of the Chicago Dispatch, "By Joseph R. Dunlop." (Rec., pp. 118–119.)

The court did not intimate to the jury in the above extract that any inference was to be drawn. The part of the charge set out is wholly inconclusive. It is taken out of the recital of a series of facts appearing in evidence which the court made to the jury. (See charge, Rec., p. 83.)

The portion of the charge set out in this assignment did not "authorize the jury to find that defendant was the publisher."

XLVIII AND XLIX.

The forty-eighth assignment of error, treated of together with assignment 49, on pages 30 and 65 of the brief, and page 4 of the additional brief, for plaintiff in error, is as follows:

> That the said district court erred in using the following language in his charge to the jury, to wit: "Now, what is an obscene, lascivious, lewd, or indecent publication is largely a question of your own conscience and your own opinion, but it must come before it can be said to be such literature or publication—it must come up to this point, that it must be calculated with the ordinary reader to deprave him—deprave his morals or lead to impure purposes."
>
> Exception by defendant's counsel to the use of the foregoing language on the ground that said language does not correctly state the test of what constitutes obscene, lewd, lascivious, or indecent literature. (Rec., p. 119.)

The forty-ninth assignment of error is as follows:

> That the said district court erred in using the following language in his charge to the jury, to wit: "Now, reading these paragraphs (the advertisements in evidence) that counsel have called to your attention, and you will take them with you to your jury room, it is your duty to ascertain in the first place if they are calculated to deprave the morals, if they are calculated to lower that standard which we

regard as essential to civilization, if they are calculated to excite those feelings which in their proper field are all right, but which transcending the limits of that proper field play most of the mischief in the world. If they are, then they are obscene, lewd, and lascivious within the meaning of the statute. If not, then they are not so within the meaning of the statute."

Exception by defendant's counsel to the use of the foregoing language, on the ground that said language does not correctly state the test of what is obscene, lewd, lascivious, or indecent literature. (Rec., p. 119.)

The exception does not state in what respect the definition is wrong.

The brief (p. 66) says that the court, in the above charge, "instructed the jury that that is obscene literature which tends to deprave the morals of the public *in any way whatever*."

This puts an unfair and unwarrantable construction upon the charge. Taking the two extracts together, with what appears between them (Rec., pp. 84–85), it is plain that the court did not mean to say that any publication tending to excite one to gambling, theft, or murder would be obscene, and that the jury fully understood that he was referring to the relation between the sexes.

In *Swearingen* v. *United States* (161 U. S., 451) the court said that "The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity."

The court took it for granted, and had a right to assume, that the jury knew the ordinary meaning of the

words "obscene, lascivious, lewd, or indecent publication." He did not undertake to define the ordinary meaning of the words, but the extent to which such publications must go, in order to make them obnoxious to the law. Therefore, when he said that "it must come up to this point, that it must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes," and that "if they are calculated to deprave the morals," then they would be "obscene, lewd, and lascivious within the meaning of the statute," he was not defining the words "obscene, lewd, and lascivious," but was limiting their application in respect to these publications.

The jury must be supposed to have had knowledge of the ordinary signification of the English language, and that "obscene" meant "offensive to chastity and delicacy, expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be exposed"; that "lascivious" meant "lustful, tending to produce voluptuous emotions"; that "lewd" meant "given to the unlawful indulgence of lust"; and that "indecent" meant "offensive to modesty and delicacy."

Therefore, what the court said was, in effect, that the jury could not convict merely if they found that the publications were offensive to chastity and delicacy or tended to produce voluptuous emotions or were offensive to modesty and delicacy, and that in determining the degree they must not be governed by the feelings of very sensitive people, but must find that the publications of this character went to the extent that they were calculated to

deprave the morals of the ordinary reader and lead him to impure purposes.

In *Rosen* v. *United States*, 161 U. S., 42, Mr. Justice Harlan said:

> Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious.

The additional brief (pp. 11–14) makes a literary excursion with the words "obscene, lewd, lascivious" for a text, comments with a literalism that would delight the heart of an old-time special pleader, upon the various notices, appeals pathetically in behalf of advertisements of "celery compound" and other hope-inspiring remedies, and confesses an utter inability to find "anything obscene, lewd, or lascivious in all this."

The brief certainly indicates that there are some to whom the advertisements are not suggestive of any wrong. It would be a happy precursor of the millennium if the world had become so pure minded that they would be suggestive of evil to none. In that event they would be promptly discontinued.

There can be found some uninstructed Adonis "who burns with bashful shame," some Rasselas, yet living in an ideal world, some Galahad so pure in heart as naught to read with wrong suggestion, some Merlin who, despite Viviens "who breathe but accusation vast and vague," will put the fairest construction on doubtful acts, and some who find "sermons in stones and good in everything."

There are, on the other hand, those of such prudishness and overcultivated sensitiveness, "listening to a shadow and looking at a sound," whose censorship would unduly hamper this plain practical world.

Between these extremes are those who take the world as it is, and see and understand in the light of surrounding circumstances.

It was in respect of the meaning of these advertisements, to this larger class, the "ordinary readers," that the judge charged and the jury decided.

If a gentleman from Arkansas, after a disagreement with another, should send him a "polite" note, inviting him to meet him "out of the State" at "early morn," in company with "a friend," it can hardly be supposed that, because the "blood and thunder" of Bob Acres did not ornament the epistle, anyone would be so unsophisticated as to think that the invitation was for a pleasant outing, merely to "kill time."

The jury had a right to read these advertisements as they were intended to be read, drawing from all the prominent features the same inferences which those to whom they were addressed were expected to draw. They could not be permitted to serve one purpose as advertisements, and the reading in this prosecution be confined to a literalism which eliminates such purpose.

The charge given by the court is sustained by the following authorities:

United States v. *Williams*, 3 F. R., 484, 485.
United States v. *Britton*, 17 F. R., 731, 733.
United States v. *Bebout*, 28 F. R., 522, 524.
United States v. *Wightman*, 29 F. R., 636.

United States v. *Slenker*, 32 F. R., 691, 693.
United States v. *Clark*, 38 F. R., 732, 733.
United States v. *Harmon*, 45 F. R., 414, 417.
United States v. *Martin*, 50 F. R., 918, 921.
United States v. *Males*, 51 F. R., 41, 42.
Anderson's Law Dictionary, "Obscene."

L AND LI.

The fiftieth assignment of error, treated of together with assignment 51 on pages 31 and 69 of the brief for plaintiff in error, is as follows:

> That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that the presumption of innocence in this case is stronger than the presumption that the Government employee who delivered the newspapers to Mr. Montgomery in the Chicago post-office building obtained said newspapers from the United States mails."
>
> Exception by defendant's counsel to the refusal to give said instruction on the ground that said instruction contains a correct statement of a rule of law applicable to the case. (Rec., pp. 119–120.)

The fifty-first assignment of error is as follows:

> That the said district court erred in refusing to give the jury the following, to wit: "The court instructs the jury that the presumption of innocence in this case is stronger than the presumption that the person who deposited the copies of the Chicago Dispatch in the box in the St. Louis post-office building, from which box the witness McAfee took said papers, obtained said newspapers from the United States mails."

> Exception by defendant's counsel to the court's refusal to give the said instruction on the ground that said instruction contains a correct statement of a rule of law applicable to the case. (Rec., p. 120.)

These two assignments, though referring to different matters, are in substance the same. They are requests to instruct as to comparative strength of presumptions. If the judge charged correctly upon the presumption of innocence, he was not bound to go on and elaborate it and confuse the jury by any such comparison. He said the presumption of innocence was absolute and stood until overturned by evidence which beyond a reasonable doubt satisfied the jury of the guilt of defendant; and this was sufficient.

He said:

> Until the Government proves beyond a reasonable doubt that he knowingly caused to be deposited such a publication in the mails the presumption of innocence stands between any penalty that the court might inflict or any verdict that you might pronounce and the defendant. That presumption of innocence is only overcome when these facts that I have named as the gist of the offense are, in your judgments, established beyond a reasonable doubt. (Rec., p. 81.)
>
> * * * * *
>
> The court instructs the jury that in this case the presumption of innocence means that it is a presumption of the law that the defendant did not deposit or cause to be deposited in the post-office for mailing any of the newspapers admitted in evidence, and this presumption should continue and prevail in the minds of the jury in such a way as to cause them to find the defendant not guilty, unless, from all the evidence in the case, beyond a reasonable

doubt, the jury are convinced that the newspapers or some one of the newspapers admitted in evidence were deposited or caused to be deposited in the post-office for mailing by the defendant.

That is the law, and I give it to you in connection with what I have already said relating to the circumstantial proof of the depositing of the newspapers.

The court instructs the jury that the presumption of innocence in this case means that the law presumes that not one of the newspapers introduced in evidence contains matter that is obscene, lewd, lascivious, or indecent, and that this presumption should continue and prevail in the minds of the jury in such a way as to cause them to acquit the defendant, unless, from all of the evidence in the case, the jury are convinced beyond a reasonable doubt that the newspapers or some one of the newspapers admitted in evidence does contain matter that is obscene, lewd, lascivious, or indecent.

That is simply a restatement of what I have already said.

The court instructs the jury that the presumption of innocence in this case means that the law presumes that the defendant, Dunlop, did not know that any of the newspapers admitted in evidence in this case contained matter that was obscene, lewd, lascivious, or indecent at the time the said newspaper was published, and that this presumption of innocence should continue and prevail in the minds of the jury in such a way as to cause them to acquit the defendant, unless, from all the evidence in the case, the jury are convinced beyond a reasonable doubt that the defendant knew that the newspapers or some one of the newspapers admitted in evidence did contain matter that was obscene, lewd, lascivious, or indecent. (Rec., p. 85.)

LII AND LIII.

The fifty-second assignment of error treated of, together with assignment 53, on pages 31 and 77 of the brief for plaintiff in error is as follows:

> That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that the office of the witness Mr. Montgomery, in the post-office building in the city of Chicago, is not a part of the post-office within the meaning of the law upon which this indictment is based."
>
> Exception by defendant's counsel to the refusal of the court to give the said instruction on the ground that said instruction contains a correct rule of the law applicable to the case. (Rec., p. 120.)

The fifty-third assignment of error is as follows:

> That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that the place where the witness McAfee found certain newspapers in the city of St. Louis, Mo., namely, the post-office inspector's office, is not a part of the post-office at St. Louis within the meaning of the law upon which this indictment is based."
>
> Exception by defendant's counsel to the refusal of the court to give said instruction to the jury on the ground that said instruction contains a correct statement of the law applicable to the case. (Rec., p. 120.)

This request was irrelevant and calculated to mislead the jury. The fact that the office of the witness was in the post-office building was a link in the chain of evidence connected with the duty of the messenger to carry

the mail from the post-office, where it was distributed to the inspector's office, as tending to show that the papers so carried came from the post-office, and came there in the mails. The gravamen of the offense was mailing, and all that was proven about the office of the inspector being in the post-office building went to show a chain of circumstances establishing the mailing. Therefore, the question of whether or not the inspector's office was in the post-office proper was not involved in the indictment, and any charge upon it would have been improper and calculated to confuse the jury, take their minds from the real issues, and lead them to think that the fact that the office of the inspector was not a part of the post-office proper would go to negative the charge in the indictment.

LIV.

The fifty-fourth assignment of error treated of on pages 32 and 79 of the brief for plaintiff in error is as follows:

> That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that there is no evidence in this case tending to show that the newspapers containing the address of R. M. Williams came from or were taken from the post-office at St. Louis, Mo."
>
> Exception by defendant's counsel to the refusal of the court to give the said instruction. (Rec., p. 120.)

This was a request to charge the jury upon the weight of the evidence, and was properly refused.

LV.

The fifty-fifth assignment of error treated of on pages 32 and 79 of the brief, and page 5 of the additional brief, for plaintiff in error is as follows:

> That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that if they believe from all the evidence in this case that it was in the power of the Government to produce as witnesses in this case the persons who it is claimed by the Government took the newspapers addressed to R. M. Williams from the post-office at St. Louis or the newspapers addressed to Mr. Montgomery from the round table in the post-office in Chicago, then the jury are at liberty to draw the inference that the Government did not produce said persons as witnesses because the Government officers conducting the prosecution believed or feared that the testimony of such witnesses, if produced, would not tend to support the theory of the prosecution in this case."
>
> Exception by defendant's counsel to the refusal of the court to give said instruction on the ground that said instruction contains a correct statement of a rule of law applicable to the case. (Rec., pp. 120–121.)

There is nothing in the evidence to show that these persons were living at the time of the trial, were in the employment of the Government, or within the jurisdiction of the court. The request, without such proof, was improper, because the foundation for the inference must be proof of the fact that it was in the power of the Government to call the witnesses. (*Sauer* v. *Union Oil Co.*, 43 La. An., 699, 707.)

LVI, LVII, LVIII, LIX.

The fifty-sixth assignment of error treated of, together with assignment 57, on pages 32 and 81 of the brief for plaintiff in error, is as follows:

> That the said district court erred in refusing to give the jury the following instruction, to wit: "That in dealing with circumstantial evidence an inference from an inference is strictly forbidden, and that therefore the jury are not at liberty in this case to assume that the clerk in the post-office inspector's office at St. Louis, Mo., did his duty, and then to infer from the assumed fact that said chief clerk did his duty that said chief clerk took the newspapers addressed to R. M. Williams from the post-office at St. Louis, Mo."
>
> Exception by defendant's counsel to the refusal of the court to give the foregoing instruction on the ground that said instruction contains a correct statement of a rule of law applicable to the case. (Rec., p. 121.)

The fifty-seventh assignment of error is as follows:

> That the said district court erred in refusing to give the jury the following instruction, to wit: "And the jury are further instructed that they are not at liberty in this case to assume that the person or persons whose custom it was to bring the Chicago Dispatch to Mr. Montgomery followed that custom or did his or their duty and took the newspaper addressed to Mr. Montgomery from the so-called round table in the post-office at Chicago, Ill., and then infer from the assumed fact that such person or persons so followed the usual custom or did their duty that said newspapers were actually deposited in the post-office at Chicago, Ill., for mailing."

Exception by defendant's counsel to the refusal of the court to give the foregoing instruction on the ground that said instruction contains a correct rule and direction applicable to the evidence. (Rec., p. 121.)

The fifty-eighth assignment of error, treated of together with assignment 59 on pages 32, 33, and 82 of the brief for plaintiff in error, is as follows:

That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that any circumstance which is essential to a conclusion of guilt against the defendant should be established beyond all reasonable doubt before it can be used by the jury against the defendant."

Exception by defendant's counsel to the refusal of the court to give the foregoing instruction on the ground that said instruction contains a correct statement of the rule of law applicable to the case. (Rec., p. 121.)

The fifty-ninth assignment of error is as follows:

That the said district court erred in refusing to give the jury the following instruction, to wit: "The court instructs the jury that in order to justify the inference of guilt from circumstantial evidence the existence of the inculpatory facts must be inconsistent with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. If you can reconcile the facts in this case on any reasonable theory consistent with the innocence of the defendant, it is your duty to do so and to find the defendant not guilty."

Exception by defendant's counsel to the refusal of the court to give the foregoing instruction on the

ground that said instruction contains a correct statement of the law applicable to the case. (Rec., p. 121–122.)

The court charged:

In that connection I charge this as the law: In that connection, if the defendant was the publisher of the paper and knew generally that just such articles as the one complained of were contained daily in the publication in his paper, then it is not necessary that you should find that he knew that these particular paragraphs were in that paper; but you must first find beyond a reasonable doubt that he knew that the paper as a rule and a matter of habit was publishing paragraphs of the character complained of.

I also instruct you that the presumption of innocence in this case is stronger than any mere presumption that Joseph R. Dunlop continued to be the publisher of the Chicago Dispatch up to July 6, 1895, even if the jury should believe, from all the evidence in the case, that at some time prior to July 6, 1895, said Joseph R. Dunlop was the publisher of the Chicago Dispatch.

You can't, as a mere presumption, say that because he was the proprietor of the Dispatch on [before] the 6th of July that therefore he continued to be the proprietor of the Dispatch on the 6th of July. You must take all the facts into consideration, and if from all these facts you find that he was the proprietor and publisher, the presumption isn't of any consequence in the case—I mean the presumption alluded to in this instruction.

The fifth and sixth instructions I think I have already sufficiently covered.

I also instruct you that if you believe, from the evidence in this case, that any witness has willfully

sworn falsely to any fact material to the issue, that the jury are at liberty entirely to disregard the testimony of such witness, except in so far as the jury may believe, if they do believe, that said witness is corroborated by other witnesses in the case or by other circumstances or by circumstances in evidence in the case.

I also instruct you that in dealing with the circumstantial evidence you are not at liberty to assume any fact as proved which is not proved, and from such fact—issue—draw an inference to support the theory of the prosecution; but you are instructed, on the other hand, in dealing with circumstantial evidence you are at liberty to draw inferences only from facts that are clearly proven.

It is your duty to enter upon the consideration of each circumstance when you are looking at circumstantial evidence proven, if you find that any circumstance has been proven, having in your minds the presumption that the defendant is innocent, and in considering such circumstances you should apply to it the presumption of innocence, and if such fact or circumstance, when considered in connection with all the evidence in the case, can be reasonably explained on the theory of the innocence of the accused, it is the duty of the jury to so explain it.

No circumstance introduced in evidence on this trial can be used by you as a basis for any interference that any one or all of the newspapers addressed to Mr. Montgomery or Mr. Williams was deposited in the post-office at Chicago for mailing, unless such circumstance is first proven beyond a reasonable doubt.

And any circumstances in this case admitted in evidence for the purpose of showing that any one or all of said newspapers were deposited in the post-office at Chicago for mailing, which is not so proved

beyond a reasonable doubt, should be wholly dismissed from your consideration, and must not be permitted to influence you to any extent against the defendant.

Now, gentlemen, if you, under the instruction of the court, taking all the proven facts in the case under consideration, and accepting as proven those which are beyond a reasonable doubt, come to the conclusion that the defendant knowingly caused to be deposited in the post-office these papers introduced in evidence, and if an inspection of these papers causes you to come to the conclusion that they contained obscene, lascivious, and indecent matter under the rules that I have given you, it is your duty to return a verdict of guilty. (Rec., pp. 85 to 87.)

The question whether or not the public can be flooded through the mails with such publications as those involved in this indictment is one of great moment. We respectfully insist that there was no error, and ask that the judgment be affirmed.

JUDSON HARMON,
Attorney-General.

J. M. DICKINSON,
Assistant Attorney-General.

DECEMBER, 1896.